84-1236 (1)

Office-Supreme Court, U.S.
FILED
JAN 29 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

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DONALD A. CABANA, SUPERINTENDENT, ET AL.,
Petitioners,

vs.

CRAWFORD BULLOCK, JR.,
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

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## QUESTIONS PRESENTED

1. The writ should be granted to determine whether the United States Court of Appeals for the Fifth Circuit has misconstrued this Court's ruling in Enmund.

2. The writ should be granted to determine whether the Court of Appeals failed to Accord the Findings of the Mississippi Supreme Court the presumption of correctness mandated by 28 U.S.C. § 2254.

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## I. INTRODUCTION

This matter is before the Court on Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit wherein that Court reversed and rendered the decision of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus.

## II. OPINIONS BELOW

**State Court:** The opinion of the Supreme Court of Mississippi affirming respondent's conviction of capital murder and sentence of death is reported as Bullock v. State, 391 So. 2d 601 (Miss. 1980). The Court denied post-conviction collateral relief without opinion. Said per curiam order was not published.

**United States Supreme Court:** This Court denied respondent's petition for writ of certiorari on direct appeal and said denial is reported as Bullock v. Mississippi, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981).

**District Court:** The opinion of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus is not reported. Bullock v. Lucas, S.D. Miss. No. J81-0357(N) (opinion dated June 29, 1983, Countiss, M., sitting as a District Judge.)

**Court of Appeals:** The panel decision of the Court of Appeals is reported as Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984). The per curiam order of the Court of Appeals denying panel rehearing and suggestion for rehearing en banc is reported as Bullock v. Lucas, 747 F.2d 1465 (5th Cir. 1984).

## III. JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 21, 1984. A timely petition for panel rehearing and a suggestion for rehearing en banc was denied October 31, 1984. The judgment of the Court of Appeals was issued, as and for the mandate, on November 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ..";

the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution as applied to the States through the Due Process Clause of the Fourteenth Amendment; 28 U.S.C. § 2254(a), viz.,

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States";

and 28 U.S.C. § 2254(d), viz.,

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the ap-

plicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

## V. STATEMENT OF THE CASE

### A. The Substantive Facts

The substantive facts as found by the Mississippi Supreme Court reflect that on the evening of September 21, 1978, Crawford Bullock, respondent, and Ricky Tucker, Bullock's future accomplice in this crime, pursued certain libationary diversions at the Town Creek Saloon located in the City of Jackson, Mississippi. Much to their chagrin the pair discovered at closing time that the person with whom they had arrived had without so much as a fare-the-well departed the premises leaving them afoot. Assuming the role as a "good Samaritan," Mark Dickson, the unfortunate victim of this scenario, offered the pair a ride.

On the way home, Bullock asked Dickson to stop at a convenience store in order for him to purchase a loaf of bread. Dickson, continuing

in the role as a benevolent benefactor, gave Bullock the thirty-five cents (35¢) necessary to accomplish the purchase; however, the purchase money was returned when Bullock discovered that the store was out of the desired commodity.

Dickson drove on at the riders' instructions. While proceeding down an uninhabited street, Bullock instructed Dickson to pull over so that he could answer "the call of nature." Upon return to the automobile, Bullock overheard an argument between Tucker and Dickson and heard Tucker state, "Don't make me pull this gun." Dickson was heard to reply that he did not have any money but that they, Tucker and Bullock, could have the automobile. All three thereupon re-entered the vehicle, and the argument continued. Dickson, apparently fearing injury, stopped on Byrd Drive near the site where an overpass on Interstate 220 was being

constructed and exited the vehicle. Blows were exchanged between Tucker and Dickson, and Dickson attempted to flee on foot. Tucker and Bullock pursued Dickson. Upon apprehending him, Tucker instructed Bullock to grab Dickson which he did by holding the hair of his head. At this point, Tucker, who had armed himself with a whiskey bottle, advanced on Dickson striking him several times in the head with the bottle. During this rain of blows, the bottle broke and cut Bullock's hand. Tucker thereupon set upon Dickson striking him with fists, feet, concrete blocks and a 2 X 4 board. The evidence later showed that Dickson died as a result of having his skull crushed.

Upon completion of the heinous deed, Tucker suggested that they burn the body. However, Bullock stated that he knew of a lake south of Jackson in the Byrum Community where they could

dispose of the body. The two then loaded Dickson's body into the car and drove to a car wash to remove the blood from the exterior of the vehicle. Tucker removed Dickson's wallet, went through it, found no money, and discarded the same in a garbage can. Bullock then drove the vehicle to his residence where the two cleaned up. After obtaining a garden hose from Bullock's yard the two proceeded south to Byrum. Upon arriving at the lake, Dickson's outer clothing was removed, concrete blocks placed in his underwear, and the garden hose with additional weights was wrapped around the body. Tucker then pulled the body out into the lake and submerged it. Bullock, apparently not satisfied with Tucker's efforts, waded out to where the body had been submerged and felt of the same with his feet to assure himself that the body was stuck in the mud at the bottom of the lake.

Bullock and Tucker again returned to Bullock's residence where they again cleaned up. Bullock, driving Dickson's vehicle, then took Tucker home and proceeded to the University of Mississippi Medical Center where he obtained medical attention for his hand. The following day, the pair drove Dickson's vehicle to McComb, Mississippi, for the stated purpose of visiting Bullock's grandfather. They failed to find him and returned to Jackson. Bullock continued to retain possession of the Dickson automobile.

During the early morning hours of September 23, 1978, Bullock began to have pain in his hand and returned to the University Medical Center, again driving Dickson's vehicle. On his way back home, Bullock was stopped and arrested by officers of the Jackson Police Department and transported to the downtown precinct station. Upon being stopped and asked

about the automobile he was driving, Bullock responded that he had borrowed it from a friend. The tag which had been on the vehicle the night of the murder had been removed and was on the back seat.

Later, Bullock made an inculpatory statement about the commission of the crime which is essentially reflected by the foregoing recitation.

## B. Procedural History

On May 18, 1979, respondent was found guilty of the crime of capital murder in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and pursuant to the Mississippi statutory bifurcated procedure, was sentenced to death by lethal gas. [MCA § 99-19-101 (Cum. Supp. 1979)]. Upon timely notice respondent exercised his right to appeal both his conviction and sentence to the Mississippi

Supreme Court. [MCA § 99-19-105 (Cum. Supp. 1979)]. On August 6, 1980, the Court affirmed the aforesaid and on January 14, 1981, denied rehearing. Bullock v. State, 391 So.2d 601 (Miss. 1980).

On March 14, 1981, Bullock filed a petition for writ of certiorari with this Court. Relief was denied on June 8, 1981. Bullock v. Mississippi, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981).

On or about July 28, 1981, respondent simultaneously filed an application for leave to file a petition for writ of error coram nobis with the Mississippi Supreme Court [MCA § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen. Laws of 1984)] and a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi containing identical grounds for relief. On January 29, 1981, the Honorable

William Harold Cox, Senior United States District Judge, stayed the execution pending further disposition. Among the grounds raised in the identical petitions, respondent contended:

> His sentence of death is excessive and disproportionate in violation of the Eighth and Fourteenth Amendments because the jury was not required to find that petitioner intended to kill.

On October 7, 1981, Presiding Justice Roy Noble Lee speaking for an unanimous court denied respondent's State application for post-conviction relief without opinion.

Upon denial of relief in the State courts, the parties' attention was once again focused on the Federal proceedings. On August 16, 1982, the Honorable Walter L. Nixon, Chief Judge, signed an order referring this matter to the Honorable John R. Countiss, III, United States Magistrate, pursuant to an agreement of

the parties under 28 U.S.C. § 636(c) to conduct any and all further proceedings in the case and order entry of a final judgment. On October 13 and 14, 1982, the Court conducted an evidentiary hearing and on June 30, 1983, filed an order denying relief.

On July 22, 1983, the Court entered a final judgment and denied respondent a certificate of probable cause under 28 U.S.C. § 2253. On July 25, 1983, respondent, represented by new counsel, moved for rehearing and on August 5, 1983, a stay was entered pending briefing and argument. On September 1, 1983, arguments were heard. Upon due consideration the motion was granted in part and denied in part with the Court reversing its position on the certificate of probable cause and the stay of execution pending appeal to the Fifth Circuit.

On September 21, 1984, the United States Court of Appeals for the Fifth Circuit reversed and rendered the decision of the District Court as such related to the denial of relief on the sentencing phase and directed that the State either sentence respondent to life imprisonment or within a reasonable time conduct a new sentencing hearing consistent with the opinion. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984) Panel rehearing and suggestion for rehearing en banc were denied without opinion. Bullock v. Lucas, 747 F.2d 1465 (5th Cir. 1984).

Inasmuch as the grant of relief was grounded solely upon this Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), we note that on direct appeal to the Mississippi Supreme Court respondent in his fourth assignment of error contended that his conviction and sentence of death violated his Eighth and Fourteenth Amend-

ment rights because the proof did not show that he either killed or intended that a killing take place and that at most it showed that he was simply an unwilling participant in the robbery-homicide. The Mississippi Supreme Court held:

> The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson and in removing and discarding his wallet and personal effects therein, and in the taking of the T-bird automobile, which was in the lawful possession and use of Dickson.
>
> Bullock v. State, supra, at 606.

Again in performing its mandatory statutory sentence review [MCA § 99-19-105 (Cum. Supp. 1979)], the Court held:

> The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to

> those other crimes so as to require this Court to reduce the sentence of life imprisonment.
>
> Bullock v. State, supra, at 614.

So too was the question presented to this Court on petition for writ of certiorari in respondent's fourth reason assigned for granting the writ. As noted infra, review was denied. Bullock v. Mississippi, supra.

In denying relief on this point, the District Court initially noted that Instruction 15 given during the guilt phase mandated that before the jury could convict the respondent they must first find that he "consented to the killing" and did an "act which was immediately connected with or leading to its [the murder's] commission." The Court then held:

> The presumption, therefore, arises that the jury found that Petitioner participated in the actual killing, that he did an act in furtherance of the actual killing, and that he consented to the killing. Jordan vs.

Watkins, 691 F.2d 1067 (5th Cir. 1982).

In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . . .." 391 So.2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.

Under Enmund, all that must be shown is that a defendant killed during the course of the commission of a felony. Without question the jury and the Mississippi Supreme Court found that Petitioner was present aiding and abetting in the commission of the homicide and that he committed an act in its consummation; however, the Mississippi Supreme Court further held that Petitioner consented to the killing. Petitioner's conviction was some three years, and the Supreme Court's opinion some two years prior to the decision in Enmund and is, therefore, not couched in its terms. Nevertheless, the reasonable interpretation of both the verdict and the opinion is that the consenting to, and actually committing an act in furtherance of, the homicide, Petitioner by legal definition actually killed. Moreover, by finding that the Petitioner consented to the homi-

> cide, the jury by definition found that he contemplated that lethal force would be employed. The Enmund criteria, therefore, were met.
>
> Slip op. at 4-5.

The Fifth Circuit reversed holding that in the absence of a talismatic finding by the jury that the defendant either killed, attempted to kill, intended to kill or contemplated that lethal force would be used the sentence of death was in violation of the mandate of Enmund.

## VI. REASONS FOR GRANTING THE WRIT

### 1. The Writ Should Be Granted To Determine Whether The United States Court Of Appeals For The Fifth Circuit Has Misconstrued This Court's Ruling In Enmund

Without question, the issue decided in Enmund concerned the disproportionality of a sentence of death where the Florida Supreme Court determined that the record did "not war-

rant a finding that Enmund had any intention of participating in or facilitating a murder." The issue, therefore, presented to this Court is directed to a determination of whether Enmund requires, as interpreted by the Fifth Circuit, a talismatic finding by the sentencing authority or may such, as interpreted by the District Court and the predominant majority of the States, concern itself with a question of appellate proportionality review.

Before delving into what we consider to be the proper construction of Enmund, let us first examine the well-spring from whence such emanates.

A review of the opinion of the Florida Supreme Court in Enmund v. State, 399 So.2d 1362 (Fla. 1981), supplies some insight into the situation. The thesis of Enmund's argument was summarized thusly:

> The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to each of the homicides is murder in the second degree, based on the felony murder rule.
>
> Id., at 1368.

The controversy, therefore, raged over whether Enmund could be convicted of first degree felony murder or second degree felony murder. In reaching its ultimate conclusion the Court citing Dixon v. State, 283 So.2d 1 (Fla. 1973), thoroughly discussed the Florida Law of Parties noting in particular that there is a distinction between principles in the first and second degree and accessories before the fact. Likewise, the Court determined that death could

be imposed if Enmund was a principle in the first degree to either the homicide or the robbery. In particular the Court noted:

> We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him as accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." State v. Dixon, 283 So.2d at 11.
>
> All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the act-

> ual perpetrator, is a principal of the second degree. They are both equally guilty of the crime being committed. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit such offense." Kauz v. State, 98 Fla. 687, 124 So. 177, 178 (1929). See generally Henderson v. State, 70 So.2d 358 (Fla. 1954); Albritton v. State, 32 Fla. 358, 13 So. 955 (1893).
>
> Id., at 1369.

While acknowledging that the Legislature purportedly repealed the three distinctions by enactment of Section 776.011, Florida Statutes (1973), it had incorporated such in certain amendments to the murder statutes enacted in 1972. Ch. 72-724, 1972 Gen. Law Fla. Consequently, the Court found that the previous body of the Law of Parties was relevant to their determination. The Court then went on to hold:

> In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commis-

sion or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. E.g. Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Furthermore, the presence of the aider and abettor need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.

Id. 84 Fla. at 446, 94 So. at 871.

Id., at 1370.

Hence, we find the comments of this Court to the effect that

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It

> was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.
>
> 73 L.Ed.2d at 1145-46.

From this point this Court went on to elaborate on the proposition that it was a violation of the Eighth and Fourteenth Amendments to impose death upon a "defendant [who] somehow participated in a robbery in the course of which a murder was committed." 73 L.Ed.2d at 1148. To this extent, the Court in reviewing all death sentences imposed as of October 1, 1981, for which sufficient data was available, held:

> That juries have rejected the death penalty in cases such as this

> one where the defendant did not commit the homicide, was not present when the killing took place and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population. As of October 1, 1981, there were 796 inmates under sentences of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar. [emphasis added]
>
> 73 L.Ed.2d at 1150.

The foregoing comments, therefore, raise several serious questions concerning the propriety of the Fifth Circuit's ruling in both this case and those upon which it is founded. Specifically, did this Court condemn the imposition of death where one was actually physi-

cally present and aiding and abetting in the homicide or did the Court intend to condemn only those death sentences where the defendant was at most an accessory to the attendant felony and was actually elsewhere when the homicide was committed? We suggest that the Court intended the latter course of action.

Shortly after the decision in Enmund was rendered the Florida Supreme Court had the opportunity to address the question of its applicability to Florida law. In particular, the Court addressed the question in terms of Law of Parties and the degree of the defendants participation, not in the attendant felony, but the degree of his participation in the actual homicide:

> We have most recently dealt with this matter in the case of Enmund v. State, 399 So.2d 1362 (Fla. 1981), rev'd on other grounds, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982).

> We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him an accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree.

399 So.2d at 1369. All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). From this it is evident that the presence of a

> defendant at the scene of a crime is required for a verdict of guilty of first-degree murder under the felony-murder statute. It is also evident that a verdict of guilty for second-degree felony-murder does not require the defendant's presence.
>
> State v. Lowery, 419 So.2d 621, 623 (Fla. 1982)

From a review of the pertinent case law we find that all of the states that have addressed this question have arrived at a similar conclusion: Enmund does not require that a sentence of death should be vacated where the proof establishes that the defendant was present and actively aided and abetted in the commission of the homicide. See: James v. State, 453 So.2d 786 (Fla. 1984); State v. Willie, 436 So.2d 553 (La. 1983); Leatherwood v. State, 435 So.2d 645 (Miss. 1983); Smith v. State, 424 So.2d 725 (Fla. 1982); State v. Aguiar, 418 So.2d 245 (Fla. 1982); People v. Garcia, 454 N.E.2d 274

(Ill. 1983); Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (1984); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983); State v. Yates, 310 S.E.2d 805 (S.C. 1982); Johnson v. Zant, 249 Ga. 812, 295 S.E.2d 63 (1982); Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Allen v. State, 321 S.E.2d 710 (Ga. 1984); State v. McKay, 680 S.W.2d 447 (Tenn. 1984); Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984); Kelly v. State, 669 S.W.2d 720 (Tex. Crim. App. 1984); State v. Tison, 690 P.2d 755 (Ariz. 1984).

Similarly, we note that the Eleventh Circuit has taken a similar position. In Stanley v. Zant, 697 F.2d 955, 973 (11th Cir. 1983), the Court rejected Stanley's Enmund claim holding:

> Stanley's level of personal culpability is greater than Enmund's by at least an order of magnitude. It was Stanley, himself, who was overheard long before the murder to say that after he and Thomas robbed the victim they would have to "get rid of him." His role was aptly described by the Supreme Court of Georgia as follows:
>
> > [T]here was evidence showing that he was an active participant in the crimes: enticing the victim to the place of the robbery, handling the pistol, guarding the victim while Thomas moved the car, digging the victim's grave, and burying the victim while he was still alive and pleading for his life.
>
> Stanley v. State, 241 S.E.2d at 180.
>
> From our examination of the record we agree with the district court that "a trier of the fact could conclude beyond a reasonable doubt that the Defendant had a clear intention to kidnap, rob and murder the victim."

Perhaps the greatest illustration of this proposition can be found in the cases involving

Freddie Lee Hall. On direct appeal to the Florida Supreme Court, Hall argued that his sentence of death was disproportionate. The Florida Supreme Court held:

> These facts support the jury's conclusion that, even if Hall did not pull the trigger, he was a principal to the crime of murder. Section 777.011, Florida Statutes (1977), states that
>
> > [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.
>
> An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert.

denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). The evidence in this case shows that either Hall or Ruffin killed Mrs. Hurst. It also demonstrates that the other was an aider and abettor. There is sufficient evidence to sustain Hall's conviction.

Hall v. State, 403 So.2d 1321, 1323 (Fla. 1981).

On petition for post-conviction relief the question was raised once again in the context of Enmund. In rejecting his claim, the Florida court again held:

Citing Enmund v. Florida, _____ U.S. _____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Hall claims that the death penalty cannot be imposed because he did not actually and intentionally kill the victim. In Enmund the Supreme Court held that Florida's death penalty statute cannot be applied to one who did not kill, attempt to kill, intend to kill, or intend that lethal force be used. We agree with the trial court that Enmund is distinguishable from the instant case. Hall provided the weapon used to kill Mrs. Hurst and was present at her death. Additionally, Enmund was an aider and abet-

> tor only to the underlying felony. Hall, on the other hand, was an aider and abettor to the homicide as well as the underlying felony. There is no doubt in the Court's mind that Hall intended Mrs. Hurst's death.
>
> Hall v. State, 420 So.2d 872, 874 (Fla. 1982).

The case thereupon proceeded to the United States District Court for the Middle District of Florida on petition for writ of habeas corpus. The Honorable Susan H. Black, District Judge, relying on the rulings of the Florida Supreme Court held:

> At trial, the state presented the case to the jury on the theory that Hall and Ruffin did everything together. They planned the robbery together and drove together to the Pantry Pride parking lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car.

This evidence is legally sufficient to withstand attack under Section 2254 if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

In order for Hall to be found guilty of first degree murder under Florida law, the state must prove that he either pulled the trigger with a "premeditated design to effect the death of the person killed," Fla.Stat. § 782.04(1)(a) (1973) or, that he was a principal to the crime of first degree murder even if he did not physically pull the trigger. Fla.Stat. § 777.011 (1977) states:

> [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as

> such, whether he is or is not actually or constructively present at the commission of such offense.

An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973).

* * *

There is ample evidence in the record of this case for this Court to hold as a matter of law that a rational trier of fact could have found beyond a reasonable doubt that Mrs. Hurst was killed with a premeditated design by either Hall or Ruffin to avoid subsequent identification of them by her. The evidence is also legally sufficient for a jury to find that the other was an aider and abettor and, therefore, a principal to the first degree murder.

Accordingly, this claim will be denied.

Hall v. Wainwright, 565 F.Supp. 1222, 1236-37 (M.D. Fla. 1983).

The Eleventh Circuit affirmed holding:

Citing Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Hall contends his sentence of death is unconstitutional

because no proof existed that he killed or intended to kill. In Enmund, the Supreme Court held that the eighth amendment prohibits imposition of the death penalty on an individual who neither took life, attempted to take life, intended to take life, or intended to utilize lethal force. Enmund, 458 U.S. at 979, 102 S.Ct. at 3376, 73 L.Ed.2d at 1151. While we do not dispute Hall's contention that Enmund stands for the proposition that an accused may not be sentenced to death absent proof that he killed, attempted to kill, intended to kill, or intended to use lethal force, we find that evidence existed to support Hall's death sentence.

In determining whether a death sentence is unconstitutionally imposed, we must look to the individual culpability of the accused. Enmund, 458 U.S. at 799-01, 102 S.Ct. at 3377-78, 73 L.Ed.2d at 1153-54; Ross v. Hopper, 716 F.2d 1528, 1529 (11th Cir. 1983). Hall's personal culpability is far more flagrant than that of the accused in Enmund. Earl Enmund drove the getaway car during a robbery at a farmhouse. He was not present at the farmhouse where the murder occurred. The record also failed to disclose that he intended to kill or attempted to kill. Enmund, 458 U.S. at 788-89, 102 S.Ct. at 3372, 73 L.Ed.2d at 1145-46. At the least, Hall was present when Hurst

was murdered, and he aided in her abduction. Moreover, Hall's gun was used to murder Hurst. This evidence supports a finding that Hall either took life, attempted to take life, intended to take life, or intended to utilize lethal force.

Therefore, after "examining the individual culpability of the defendant, as did the Supreme Court in Enmund, we conclude that the punishment was not disproportionate in relation to Hall's participation in the crime." Ross v. Hopper, 716 F.2d 1528, 1533 (11th Cir. 1983). See also Henry v. Wainwright, 721 F.2d 990, 995 (11th Cir. 1983). Hall v. Wainwright, 733 F.2d 766, 771 (11th Cir. 1984).

In particular we note the comments of Judge Politz herein:

In Enmund, the Supreme Court held that the eighth amendment forbids "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797, 102 S.Ct. at 3376-77. The Court further emphasized that "[t]he focus must be on [the particular defendant's] culpability, not on that of those who

committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,'" (citations omitted). 458 U.S. at 798, 102 S.Ct. at 3377. See Smith v. Oklahoma, ____ U.S. ____, 104 S.Ct. 324, 78 L.Ed.2d 297 (1983) (vacating a death sentence and remanding for further consideration in light of Enmund); Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983). In Reddix we sought to capsulate these directives by observing, Enmund recognizes that the death penalty is unique in its severity and its irrevocability; consequently, before the state may impose it, the state must focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice." 728 F.2d at 708. Accordingly, while the trier of fact may impute intent to an aider and abettor for the purpose of determining guilt, that imputation may not be done for the purpose if imposing the death penalty. Reddix; Skillern.

Bullock v. Lucas, supra, at 246-47.

The reasoning underlying these comments runs throughout all of the cases decided by the Fifth Circuit on this subject. Such we submit is erroneous in light of the analysis

infra. Contrary to the rule announced in both Reddix and the case sub judice, it is abundantly clear that Enmund only forbids the imposition of death where the defendant was an accomplice to the attendant felony. Therefore, where, as we find here, the defendant was actually present and aiding and abetting in the commission of the homicide, the requirements of Enmund are met and a sentence of death is appropriate.

Within this context, we note that the Fifth Circuit has consistently held that before death may be imposed there must be some talismatic finding by the trial jury of one of the four Enmund criteria. Such is obviously erroneous. As noted infra, the Court in Enmund plainly stated that it was basing its decision on the findings of the Florida Supreme Court and not the trial court. In particular we note that this Court has denied certiorari on at

least three occasions refusing to review cases even though no such talismatic finding was made. Newlon v. Missouri, ____ U.S. ___, 103 S.Ct. 185, 73 L.Ed.2d 1140 (1982) (Brennan and Marshall, JJ. dissenting from the denial of certiorari); Smith v. Florida, ___ U.S. ____, 103 S.Ct. 3129 (Marshall, J., dissenting from the denial of certiorari); Garcia v. Illinois, _____ U.S. _____, 104 S.Ct. 3555 (Marshall and Brennan, JJ., dissenting from the denial of certiorari). [1]

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[1] While we are mindful of the fact that the denial of certiorari is normally of no precedential value, we note the ruling of the Court in Maggio v. Williams, ___ U.S. _____, 78 L.Ed.2d 43, 104 S.Ct. 311 (1983). Apparently, the denial of certiorari on direct appeal from a death verdict has taken on added significance in the wake of Barefoot v. Estelle, _____ U.S. _____, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983).

Enmund is clearly a question properly cognizable under proportionality review. Pulley v. Harris, _____ U.S. _____, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); California v. Ramos, ___ U.S. _____, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983); Solem v. Helm, _____ U.S. _____, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Consequently, there is no constitutional infirmity in allowing the Mississippi Supreme Court to make the requisite findings in performing their mandatory sentence review. See: Pulley v. Harris, supra; Miss. Code Ann. § 99-19-105 (Supp. 1983); Williams v. State, 445 So.2d 798 (Miss. 1984). Accord: Leatherwood v. State, supra; Irving v. State, 441 So.2d 846 (Miss. 1983); Stringer v. State, 454 So.2d 468 (Miss. 1984); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983). In this regard such would be consistent with the ruling in Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), to the effect

that it is not necessary for the trial court to give limiting instructions on the definition of the aggravating circumstances where State law requires the State Supreme Court to assess the evidence independently and determine whether the record supports the aggravating circumstances before affirming the sentence of death. See also: Moore v. Zant, 722 F.2d 640 (11th Cir. 1983). Accord: Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

We, therefore, submit that the finding by the Mississippi Supreme Court that Bullock was an active and willing participant in the robbery and homicide of Mark Dickson and that he actually held the victim while the co-defendant struck him with a whiskey bottle was sufficient under Enmund to impose a sentence of death. We suggest the ruling of the Fifth Circuit interpreting Enmund is erroneous and that certiorari

should be granted and a briefing schedule established.

**2. Certiorari Should Be Granted To Determine Whether The Court Of Appeals Failed To Accord The Findings Of The Mississippi Supreme Court The Presumption Of Correctness Mandated By 28 U.S.C. § 2254**

As discussed infra, Enmund is clearly a question cognizable under proportionality review. Pulley v. Harris, supra; California v. Ramos, supra; Solem v. Helm, supra. Consequently, there is no constitutional infirmity in allowing the Mississippi Supreme Court to make the requisite findings in performing their mandatory sentence review. See: Pulley v. Harris, supra; Miss. Code Ann. § 99-19-105 (Supp. 1983); Williams v. State, 445 So.2d 798 (Miss. 1984). Accord: Leatherwood v. State, 435 So.2d 645 (Miss. 1983); Irving v. State, 441 So.2d 846 (Miss. 1983); Stringer v. State,

454 So.2d 468 (Miss. 1984); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983). In this regard we note the ruling in Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), to the effect that it is not necessary for the trial court to give limiting instructions on the definition of the aggravating circumstances where State law requires the State Supreme Court to assess the evidence independently and determine whether the record supports the aggravating circumstances before affirming the sentence of death. See also: Moore v. Zant, 722 F.2d 640 (11th Cir. 1983). Accord: Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Consequently, we submit that the Federal courts are bound by the Mississippi Supreme Court's findings under petitioner's Fourth Assignment of Error on direct appeal and the findings that the sentence was not disproportionate because the evidence clearly showed

that respondent was an active and willing participant in both the homicide and the robbery.

Such, we submit, is the technical equivalent to a finding that petition killed, attempted to kill, intended to kill or contemplated that lethal force would be used. James v. State, supra; State v. Willie, supra; Leatherwood v. State, supra; Smith v. State, supra; State v. Aguiar, supra; People v. Garcia, supra; Jones v. Francis, supra; State v. Oliver, supra; Williams v. State, supra; State v. Yates, supra; Johnson v. Zant, supra; Buttrum v. State, supra; Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983), aff'd., 733 F.2d 766 (11th Cir. 1984); Soloman v. Kemp, 735 F.2d 392 (11th Cir. 1984); Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983); Stanley v. Zant, supra.

We, therefore, submit that in reversing the ruling of the district court the Court of Appeals failed to accord the aforesaid findings

of fact the presumption of correctness mandated by 28 U.S.C. § 2254(d). To this end we note that substantively speaking, Section 2254(d) requires federal courts in habeas proceedings to accord a presumption of correctness to state courts' findings of fact or explain why the presumption is not applicable in view of the factors listed in the statute. Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). This presumption applies to factual determinations made by both state trial and appellate courts. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The high measure of deference to which a state court's factual findings are entitled requires that a federal court, considering an application for habeas corpus, more than simply disagree with the state court before rejecting its factual determinations; instead, it must conclude that the state court's findings lacked even fair

support in the record. Marshall v. Lonberger, ___ U.S. ____, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). Within this regard, a state court's determination of what a jury was permitted to find and in reality did find is presumptively correct unless rebutted. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982); Wainwright v. Goode, ____ U.S. ____, 78 L.Ed.2d 197, 104 S.Ct. 378 (1984).

Anticipating the response to this argument, i.e., that no specific finding was made, we submit that due to the fact that the very same arguments were advanced in both this Court as well as the State courts on direct appeal that the Enmund findings are implicit in the ruling of the Mississippi Supreme Court. To this extent LaVallee v. Delle Rose, 410 U.S. 690, 35 L.Ed.2d 637, 93 S.Ct. 1203 (1973), is dispositive. There the Court dealt with a state court hearing in which the trial judge failed to make express findings as to the de-

fendant's credibility. The Court held, relying on Townsend v. Sain, 373 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), that because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony its failure to grant relief was tantamount to an express finding against the credibility of the defendant.

Such reasoning inevitably leads to a similar conclusion here. It is clear that at the very least there was an implicit finding that Bullock actually participated in the killing or intended a killing or contemplated that lethal force would be used. Considering the actual ruling of the Mississippi Supreme Court in conjunction with the actual arguments advanced, there can be no other conclusion. We, therefore, submit that the Court of Appeals erred

and that certiorari review would be appropriate under the circumstances.

## VII. CONCLUSION

For the foregoing reasons petitioners respectfully request the Court to grant the petition for writ of certiorari to the Court of Appeals to review the decision herein.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

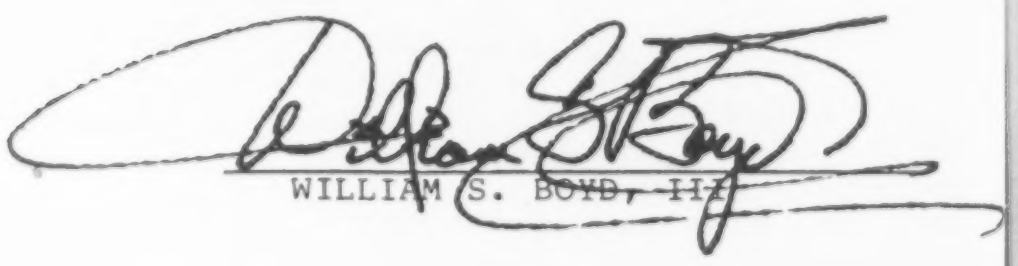
I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari to the following:

Shearman & Sterling
Attorneys at Law
53 Wall Street
New York, New York 10005

and

Stanfield & Holderfield
Attorneys at Law
1439 West Capitol Street
Jackson, Mississippi 39205

This, the 29th day of January, 1985.



WILLIAM S. BOYD, III

Crawford BULLOCK, Jr.
Petitioner-Appellant

v.

Eddie LUCAS, Warden, and State of Mississippi, Respondents-Appellees.

No. 83-4702.

United States Court of Appeals,
Fifth Circuit

October 31, 1984.

POLITZ, WILLIAMS and GARWOOD, Circuit Judges.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

DENIED.

Crawford BULLOCK, Jr.
Petitioner-Appellant

v.

Eddie LUCAS, Warden, and State of Mississippi, Respondents-Appellees.

No. 83-4702.

United States Court of Appeals,
Fifth Circuit

Sept. 21, 1984.

Defendant who had been convicted of capital murder in state court and sentenced to death, after exhausting state remedies, petitioned for federal writ of habeas corpus. The United States District Court for the Southern District of Mississippi, John R. Countiss, Magistrate, denied petition, and defendant appealed. The Court of Appeals, Politz, Circuit Judge, held that sentence of death could not stand in light of jury instruction which permitted imposition of death

penalty merely because defendant participated in robbery "with or without any design to effect the death of" victim.

Reversed and Rendered.

Garwood, Circuit Judge, concurred and filed opinion.

1. Criminal Law - 1208.1(4)

While trier of fact may impute intent to aider and abettor for purpose of determining guilt, that imputation may not be done for purpose of imposing death penalty. U.S.C.A. Const.Amend. 8.

2. Criminal Law - 1188
Homicide - 354

Sentence of death for conviction of capital robbery-murder could not stand, in light of jury instruction which permitted

imposition of death penalty merely because defendant participated in robbery "with or without any design to effect the death of" victim; state was required to either impose sentence of life imprisonment or, within reasonable time, conduct new sentencing hearing to determine whether defendant actually killed, attempted to kill, intended that killing take place, or contemplated use of lethal force. U.S.C.A. Const.Amend. 8; Miss.Code 1972, §§ 97-3-19(2)(e), 99-19-101(7).

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Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, WILLIAMS and GARWOOD, Circuit Judges. *

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* GARWOOD, Circuit Judge, concurring.

POLITZ, Circuit Judge:

Informed by the teachings of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73

L.Ed.2d 1140 (1982), and guided by, inter alia, our recent decision in Reddix v. Thigpen, 728 F.2d 705 (5th Cir.), reh'g denied, 732 F.2d 494 (5th Cir. 1984), we direct issuance of a writ of habeas corpus, to the end that Crawford Bullock, Jr. be sentenced to life imprisonment or accorded a sentencing hearing consistent herewith.

## Contextual Background

Crawford Bullock, Jr., was found guilty of the offense of capital murder, in a felony-murder setting, by a Mississippi state court jury and sentenced to death by lethal gas. His conviction and sentence were affirmed by the Supreme Court of Mississippi, Bullock v. State, 391 So.2d 601 (Miss. 1980), cert. denied, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed.2d 432 (1981). The Mississippi high court subsequently reject Bullock's application for

leave to file a petition for writ of error coram nobis.

With state remedies exhausted, Bullock sought Great Writ relief, 28 U.S.C. § 2254, alleging that his death sentence was prohibited by the eighth and fourteenth amendments, as explicated in Enmund, because he neither killed, attempted to kill, intended the death of the robbery victim, nor contemplated the use of lethal force. After a trial by consent before a magistrate, 28 U.S.C. § 636(c), Bullock's petition was denied. Judgment was entered by the district court. Bullock appeals, urging the foregoing constitutional argument. He further urged a due process deprivation based on the assertion that the Mississippi Supreme Court failed to make an appropriate proportionality review. In light of the intervening decision in Pulley v. Harris, _____ U.S. _____, 104 S.Ct. 871, 79

L.Ed.2d 29 (1984), that assignment of error is abandoned. We address only the Enmund-based contention.

## Facts

The events leading to the tragic homicide which is at the core of this case began in the evening hours of September 21, 1978, when Bullock, with one leg encased in a cast, and Ricky Tucker repaired to the Town Creek Saloon in Jackson, Mississippi for a night of drinking. Sometime after midnight they left the tavern accepting a ride from Mark Dickson because their driver had left earlier. On the way to Tucker's house Bullock asked Dickson to stop at a convenience store so he could buy a loaf of bread. Dickson gave Bullock money for the purchase. The store had no bread, Bullock returned Dickson's money and the drive resumed.

As the three men continued the journey towards Tucker's place, they drank heavily from a bottle of whiskey. At some point Bullock asked Dickson to stop the car so he could answer a call of nature. Upon returning to the vehicle, Bullock heard Tucker and Dickson arguing and heard Tucker say, "Don't make me pull this gun." Apparently Dickson was indebted to Tucker for illicit drugs and after insisting he had no money offered Tucker his auto in payment. Bullock reentered the vehicle and both the argument and the trip resumed with Dickson driving. Dickson finally stopped the car near a construction site and he and Tucker exchanged blows. At Tucker's importuning, Bullock grabbed Dickson but Dickson broke away and ran from the car with Tucker in pursuit wielding the whiskey bottle. Bullock, slowed down by his cast, trailed behind. Tucker tackled Dickson and when Bullock reached them

the two were fighting. Bullock grabbed for Dickson and was holding him by the head when Tucker Struck Dickson on the head with the whiskey bottle. The blow broke the bones in Bullock's hand and cut it. Tucker struck Dickson with his fists until Dickson fell to the ground, then kicked him in the head. Tucker continued the assault by smashing Dickson in the head with a concrete block over and over until Dickson died.

Tucker suggested that they burn Dickson's body and car; Bullock countered by suggesting that they dispose of Dickson's body in a nearby lake. The latter course was followed and Dickson's body was loaded in the car. Tucker took Dickson's wallet but threw it away when he saw it contained no money. Tucker and Bullock then drove to a carwash and cleane the blood from the car's exterior. Thereafter, they drove to Bullock's house, secured a garden hose

and then motored to a lake near Byram, Mississippi. At the lake, they removed Dickson's outer clothing, placed concrete blocks inside his underclothes, wrapped the hose around his body and submerged the body in the lake. Tucker pulled the body into the lake, Bullock followed and helped press it into the lake's bottom.

Tucker and Bullock were apprehended and indicted for the capital offense of robbery-murder in violation of Miss.Code Ann. § 97-3-19(2)(e), based on the death of Dickson in connection with the felonious taking of Dickson's auto and wallet. The two miscreants were tried separately. Tucker was convicted and sentenced to life imprisonment. Bullock, as noted, was convicted and sentenced to death.

## Analysis

[1] In Enmund, the Supreme Court held that the eighth amendment forbids "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797, 102 S.Ct. at 3376-77. The Court further emphasized that "[t]he focus must be on [the particular defendant's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,'" (citations omitted). 458 U.S. at 798, 102 S.Ct. at 3377. See Smith v. Oklahoma, _____ U.S. _____, 104 S.Ct. 324, 78 L.Ed.2d 297 (1983) (vacating a death sentence

and remanding for further consideration in light of Enmund); Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983). In Reddix we sought to capsulate these directives by observing, "Enmund recognizes that the death penalty is unique in its severity and its irrevocability; consequently, before the state may impose it, the state must focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice." 728 F.2d at 708. Accordingly, while the trier of fact may impute intent to an aider and abettor for the purpose of determining guilt, that imputation may not be done for the purpose of imposing the death penalty. Reddix; Skillern.

[2] Bullock contends that his death sentence is constitutionally infirm under Enmund because the instructions to the jury permitted the death sentence without a specific

finding that Bullock either killed, attempted to kill, or intended a killing or the use of lethal force. Such was the argument proffered in Reddix. We were persuaded in Reddix; we are likewise now so persuaded.

Bullock was convicted under Mississippi's capital murder statute which provides in pertinent part:

> The killing of a human being without the authority of law by any means or in any manner shall be capital murder . . .
>
> When done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . or in any attempt to commit such . . ..

Miss. Code Ann. § 97-3-19(2)(e). The statute, in permitting a verdict of guilty absent a finding of a design to effect death, allows the imputation of intent from one defendant to another. As noted, neither Enmund nor any decision of this court purports to interfere

with a state's pronouncements substantively defining criminal offenses. Guilt of the offense may be based on imputed intent; capital punishment may not be. In light of Enmund and its progeny, care must be taken to assure that the trier of fact does not confuse the applicable standard for the determination of guilt and the standard constitutionally mandated for the determination of punishment.

Mississippi bifurcates capital offense trials. Miss. Code Ann. § 99-19-101. At the conclusion of the guilt phase the trial judge charged the jury (emphasis ours):

> The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on September 21, 1978, in the First Judicial District of Hinds County, Mississippi, Crawford Bullock, Jr., was present, consented to, and encouraged the commission of a crime and thereby aided another individual, and that he, the said Crawford Bullock, Jr. or the other then and there did willfully, unlawfully and feloniously take and carry away the

personal property of another from the presence of Mark Dickson, and from his person, against his will, by violence to his person, to-wit his billfold or one 1978 Thunderbird automobile then in his possession, then and in that event, the Defendant, Crawford Bullock, Jr. is guilty of robbery as if he had with his own hands committed the whole offense; and, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in concert with another, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the death of the said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder, and the form of your verdict should be in the following form, written on a separate sheet of paper: "We, the Jury, find the Defendant, Crawford Bullock, Jr., guilty of Capital Murder."

After the jury found Bullock guilty, the trial continued with the sentencing phase at which the prosecutor and the defense presented evidence of aggravating and mitigating factors. At the conclusion of that hearing, the jury was instructed to weigh the evidence, balance the relevant aggravating and mitigating facts, and impose a sentence of either death or life imprisonment. Miss. Code Ann. § 99-19-101. Because the then existing

Mississippi death penalty statute did not so require, [1] the court gave the jury no further instruction at the sentencing phase requiring the jury to focus on Bullock's personal intent and culpability as mandated by Enmund.

We find Bullock's sentence of death constitutionally infirm. We perceive no error of constitutional or lesser proportions in his

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1 Following Enmund, in 1983 Mississippi amended its death penalty statute. Miss. Code Ann. § 99-19-101(7) now provides:

> In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
> (b) The defendant attempted to kill;
> (c) The defendant intended that a killing take place;
> (d) The defendant contemplated that lethal force would be employed.

conviction; that remains undisturbed. But the penalty of death may not stand in light of the jury instruction which would permit of the imposition of the death penalty merely because Bullock participated in the robbery "with or without any design to effect the death of the said Mark Dickson." We accordingly direct issuance of a writ of habeas corpus vacating the death sentence of Crawford Bullock, Jr., but permitting the State of Mississippi, at its option, to either impose a sentence of life imprisonment or, within a reasonable period of time, conduct a new sentencing hearing consistent herewith.

REVERSED and RENDERED and returned to the district court with instructions.

GARWOOD, Circuit Judge, concurring:

I concur in Judge Politz's persuasive opinion. These remarks are appended only to reflect my understanding that we do not hold

that the death penalty may not be imposed upon "'. . . a participant in the commission of the felony who lacked the requisite intent to murder but did take part in the actual killing . . .'." Reddix v. Thigpen, 732 F.2d 494, 495 (5th Cir. 1984) (quoting from Drake v. Francis, 727 F.2d 990, 997 (11th Cir. 1984)). Here, however, it appears that the entire case was essentially tried on the theory, in full accordance with the then law of Mississippi, that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing. It is not unreasonable to infer that Bullock's jury may have reached the result it did despite concluding both that Bullock had no design to effect death and that the affray reached the level of being potentially fatal to Dickson only well after Bullock had backed away and ceased any personal participation in it.

Had the case not been tried on the theory of the then Mississippi law or had Dickson died from the whiskey bottle blow to his head, we would have to assess the adequacy of the instructions in a materially different context.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CRAWFORD BULLOCK, JR. PETITIONER

VERSUS CIVIL ACTION
NO. J81-0357(N)

EDDIE LUCAS, WARDEN, et al., RESPONDENTS

FINAL JUDGMENT

This matter having come before the Court on a former day for evidentiary hearing and after receiving briefs of counsel rendered an opinion on June 30, 1983. In that opinion the Court found that the Petition for Writ of Habeas Corpus was without merit and should be dismissed.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus filed herein should be denied and the same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the Court having been informed by counsel for the petitioner that they shall seek an appeal to the United States Court of Appeals for the Fifth Circuit that pursuant to Barefoot v. Estelle, _____ U.S. _____, 51 U.S.L.W. 5189 (1983), this Court has been unable to isolate any substantial question of merit in the instant petition and that a certificate of probable cause pursuant to 28 U.S.C. § 2253 should be and the same is hereby denied.

SO ORDERED AND ADJUDGED on this the 22 day of July, 1983.

/S/ John R. Countiss, III
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J81-0357(N)

CRAWFORD BULLOCK, JR. PETITIONER

VERSUS

EDDIE LUCAS, WARDEN, et al RESPONDENTS

# O P I N I O N

Crawford Bullock, Jr. was convicted of capital murder on May 18, 1979, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and after a hearing before the jury on the punishment phase of his trial, received the death penalty. On August 6, 1980, the Mississippi Supreme Court affirmed his conviction, and rehearing was denied on January 14, 1981. Bullock vs. State, 391 So.2d 601 (Miss. 1981). His petition for Writ of Certiorari was denied by the United States Supreme Court on June 8, 1981. Bullock v.

Mississippi, 452 U.S. 931 (1981). The Mississippi Supreme Court denied his application for leave to file a petition for writ of error coram nobis on October 7, 1981.

His state remedies exhausted, Bullock filed a petition for writ of habeas corpus in this Court. The Honorable William Harold Cox, United States District Judge, stayed execution on July 29, 1981, pending further order of this Court.

The matter was referred to the undersigned United States Magistrate, pursuant to an agreement of the parties under 28 U.S.C. § 636(c), to conduct further proceedings in the case and to enter final judgment. On October 13-14, 1982, an evidentiary hearing was conducted.

## Factual History

The facts of this case, as established by the Mississippi Supreme Court, 391 So.2d 601, 604-605 (Miss. 1981), are summarized as follows:

Crawford Bullock, Jr. and Rickey Tucker spent the evening of September 21, 1978, drinking at Town Creek Saloon, a local bar. Leaving in the early hours of September 22, they were offered a ride home by Mark Dickson. At one point an argument broke out between Tucker and Dickson. Dickson stopped the car at Byrd Avenue and blows were exchanged between the two men. Bullock, in order to assist Tucker, grabbed Dickson's head seconds before Tucker hit Dickson on the head with a whiskey bottle. The bottle, as it broke, cut Bullock's hand. Tucker knocked Dickson to the ground and

repeatedly struck him in the head with a concrete block, causing his death.

After checking Dickson's clothing for money and valuables, the two men put the body into Dickson's automobile, drove to a lake near Byram, where the body, weighted with concrete blocks, was submerged and pressed into the mud. Bullock was picker up in Dickson's automobile by the Jackson City Police on September 23 while he was driving home from the University Medical Center where he had sought attention for his hand. At the police station, Bullock made inculpatory oral and written statements.

This Court is bound by the findings of fact of the Mississippi Supreme Court, Sumner vs. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), and the petitioner having raised no question concerning the sufficiency

of the evidence upon which these conclusions are based, they are presumed correct.

CONCLUSIONS OF LAW

I. The sentence [of death meets constitutional] requirements.

During the course of these proceedings the United States Supreme Court rendered its decision in Enmund vs. Florida, ____ U.S. ____, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982). Enmund's petition for certiorari was granted, ____ U.S. ____, 70 L.Ed.2d 246, 102 S.Ct. 473 (1981), to consider the validity of the death penalty under the Eighth and Fourteenth Amendments "'for one who neither took life, attempted to take life, nor intended to take life.'" Enmund, supra, 73 L.Ed.2d at 1145.

Enmund concludes that the death penalty is permissible where one of three conditions

exists: (1) where the defendant killed, (2) where the defendant attempted to kill, or (3) where the defendant intended that a killing take place or that lethal force was to be employed.

During the guilt phase in the present case, Instruction 15 informed the jury that before they could find Crawford Bullock guilty of capital murder they must find:

> . . . that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in concert with another, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Carwford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self-defense, by any means, in any manner, whether done with or without any design to effect the death of the

> said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder . . .. (Emphasis added) (R. 1418-1419).

The presumption, therefore, arises that the jury found that Petitioner participated in the actual killing, that he did an act in furtherance of the actual killing, and that he consented to the killing. Jordan vs. Watkins, 691 F.2d 1067 (5th Cir. 1982).

In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . .." 391 So.2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.

Under Enmund, all that must be shown is that a defendant killed during the course of the commission of a felony. Without question the jury and the Mississippi Supreme Court found that Petitioner was present aiding and abetting in the commission of the homicide and that he committed an act in its consummation; however, the Mississippi Supreme Court further held that Petitioner consented to the killing. Petitioner's conviction was some three years, and the Supreme Court's opinion some two years prior to the decision in Enmund and is, therefore, not couched in its terms. Nevertheless, the reasonable interpretation of both the verdict and the opinion is that the consenting to, and actually committing an act in furtherance of, the homicide, Petitioner by

legal definition actually killed. Moreover, by finding that the Petitioner consented to the homicide, the jury by definition found that he contemplated that lethal force would be employed. The Enmund criteria, therefore, were met.

II. This court may not review the proportionality of sentences between Bullock and Tucker.

Although not contained specifically in the pre-trial memorandum, Petitioner asks this Court to consider the proportionality of sentences between Petitioner, who received a death sentence, and his co-defendant, who received a life imprisonment sentence. This was considered at length by the Mississippi Supreme Court on direct appeal. Bullock, supra, at 612-614.

In Spinkellink vs. Wainwright, 578 F.2d 582 (5th Cir. 1978), the Court of Appeals

considered the question of federal intervention into the proportionality of sentencing. The Court determined that a state may impose the death penalty so long as it does so through a statute with appropriate standards to guide discretion.

> If a state has such a properly drawn statute . . . which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed. For us to read these cases otherwise would thrust this Court and the district courts into the substantive decision making of the state court sentencing process which is rightfully reserved to the Florida state judiciary under Section 921.141. Under the Constitution, as well as fundamental notions of federalism and comity, that is not the role of the federal courts. Cf. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Section 99-19-105, Mississippi Code of 1972 (Supp. 1977), set out the procedure the State Supreme Court must follow in considering a sentence of death. Mississippi's statutory scheme in death penalty cases has passed constitutional muster in Jordan vs. Watkins, 681 F.2d 1067 (5th Cir. 1982), and Gray vs. Lucas, 677 F.2d 1086 (5th Cir. 1982). Our inquiry must end there.

III. The trial court properly refused to grant a lesser included instruction on muder [sic]-less-than-capital.

Petitioner has assigned two grounds in his petition concerning the failure to grant a lesser included instruction on murder-less-than-capital: (1) that trial counsel rendered ineffective assistance for failing to request it and objecting to the State's proffered instruction; (2) that

Petitioner was denied due process under the Fourteenth Amendment.

A. Petitioner may not complain about the failure to instruct on the lesser included charge of murder-less-than-capital.

This question of failure to instruct on murder-less-than-capital was raised for the first time in Petitioner's application for post-conviction relief. The Mississippi Supreme Court denied the application without opinion; therefore, we must presume the Court invoked a procedural bar. United States v. Frady, _____ U.S. _____, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); County Court of Ulster Cty. vs. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Townsend vs. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963); Ratcliff vs. Estelle, 597 F.2d 474 (5th Cir. 1979).

The record shows that trial counsel objected to State's instruction 2 dealing with murder-less-than-capital. It is a well established rule in both the state and federal courts that if a defendant objects to a particular instruction, under the doctrine of invited error, he cannot later complain of the failure of the trial court to grant it. Reddix vs. State, 381 So.2d 999 (Miss. 1980); Fermo vs. State, 370 So.2d 930 (Miss. 1979); United States vs. Gray, 626 F.2d 494 (5th Cir. 1980); United States vs. Enstan, 622 F.2d 857 (5th Cir. 1980). If the denial of such an instruction was error, the doctrine of invited

error applies, and Petitioner is barred from complaining absent a showing of "cause" and "actual prejudice." Engle vs. Isaac, _____ U.S. _____, 102 S.Ct. 1588, 71 L.Ed.2d 783 (1982); Wainwright vs. Sykes, 433 U.S. 72, 52 L.Ed.2d 594, 97 S.Ct. 2497 (1979).

The only allegation of "cause" contained in the petition and pre-trial brief appears to dwell on ineffective assistance of counsel. In this circuit ineffective assistance of counsel does not satisfy the "cause" requirements here. Washington vs. Estelle, 648 F.2d 276 (5th Cir. 1981); Lumpkin vs. Ricketts, 551 F.2d 680 (5th Cir. 1977). Petitioner's Fourteenth Amendment claim, then, has no merit.

B. Petitioner was not denied effective assistance of counsel by his trial attorney's objection to State's instruction number 2.

State's instruction 2 would have instructed the jury during the guilt phase that

they could have found Petitioner guilty of murder-less-than-capital. Before a lesser included instruction is appropriate, both the indictment and the facts must support it. Biles vs. State, 338 So.2d 1004 (Miss. 1976); Jackson vs. State, 337 So.2d 1242 (Miss. 1976).

The indictment involved here charged that on or about September 22, 1978, the defendant "did then and there without authority of law, unlawfully and feloniously kill and murder . . .." (R. 2) In order to sustain a conviction of murder, the indictment must allege "malice aforethought" or "deliberate design." Pendergraft vs. State, 213 So.2d 560 (Miss. 1968); Bangren vs. State, 196 Miss. 887, 25 So.2d 470 (1040); Buchanan vs. State, 97 Miss. 839, 53 So. 399 (1910); Sections 97-3-19(1)(A) and 99-7-37, Mississippi Code of 1972 (Supp. 1974).

Deliberate design, purposeful intent or malice aforethought are not constitutionally mandated elements in felony-murder/capital murder. Hopper vs. Evans, ____ U.S. ____, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982); Enmund vs. Florida, supra. As the court held in Enmund, before the death penalty may be imposed in the context of the instant matter, there must be a showing that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force would be employed. Petitioner was indicted for the "unlawful" and "felonious" murder of Mark Dickson and be definition these terms were sufficient to meet the Enmund criteria.

Petitioner's argument that the objection to State's instruction no. 2 constituted ineffective assistance of counsel has no foundation in law. Objection to an improper instruction does not constitute ineffective

assistance of counsel. Lovett vs. State of Florida, 627 F.2d 706 (5th Cir. 1980); Barbers vs. Estelle, 616 F.2d 178 (5th Cir. 1980).

Testimony adduced at the evidentiary hearing unequivocably reveals that the objection to the proffered instruction was a conscious and informed decision of trial tactics and, therefore, cannot be the basis for constitutionally ineffective representation unless it was so ill-chosen that it permeated the entire trial with obvious unfairness. Daniels vs. Maggio, 669 F.2d 1075 (5th Cir. 1982); Fitzgerald vs. Estelle, 505 F.2d 1334 (5th Cir. 1975). Throughout the trial and on appeal, counsel stressed that there was no showing of intent to rob. If this were, in fact, the situation, then Petitioner could not be found guilty of capital murder. In this same vein, counsel, in looking after the best interests of his client, believed, based upon

the indictment, that he could bar a conviction for simple murder. This would leave the jury with only two alternatives; acquittal or conviction of manslaughter. His strategy appears to have been well taken and cannot in hindsight be considered ineffective or in error. Washington vs. Watkins, 655 F.2d 1346 (5th Cir. 1981); Gray vs. Lucas, supra.

IV. Sentencing Instructions.

Petitioner has raised questions in this court regarding other instructions.

A. Bar to federal review.

A federal court is barred from considering claims on habeas review which rest on an adequate foundation of state substantive or procedural law. United States vs. Frady, ____ U.S. _____, 71 L.Ed.2d 816, 102 S.Ct. 1584 (1982); Engle vs. Isaac, _____ U.S. _____, 71

L.Ed.2d 783, 102 S.Ct. 1558 (1982); Wainwright vs. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977); Francis vs. Henderson, 425 U.S. 536, 48 L.Ed.2d 149, 96 S.Ct. 1708 (1976). If a state prisoner is required by state law to raise a timely challenge to a particular point or proceeding and fails to do so, he is barred from raising the claim in a federal habeas proceeding absent a showing of "cause" and "actual prejudice." Francis vs. Henderson, supra; Wainwright vs. Sykes, supra.

Similarly, prisoners will not be heard to complain particular errors where a proper challenge was not made and at the time there existed some foundation in law for an objection. Engle vs. Isaac, 102 S.Ct. at 1573, hold "later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair." The unencouraging

status of the law at the time of trial is not sufficient cause to excuse an otherwise lawful and final state procedural waiver. Dumont vs. Estelle, 513 F.2d 793 (5th Cir. 1975).

B. State procedural rules barring review.

Like the Federal courts, the Mississippi courts will not recognize errors or objections unless a timely challenge is raised. Parker v. State, 367 So.2d 456 (Miss. 1979); Martin vs. State, 354 So.2d 1114 (Miss. 1978). Contemporaneous objection is necessary to preserve a point on appeal. Pittman vs. State, 297 So.2d 888 (Miss. 1974); Myers vs. State, 268 So.2d 353 (Miss. 1972).

Mississippi provides only limited collateral review of convictions. In re Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964). Prisoners may not raise claims that could have been litigated before judgment or on

direct appeal, Holloway vs. State, 261 So.2d 799 (Miss. 1972), nor may they raise claims which have already been decided on direct appeal. Wetzel vs. State, 225 Miss. 450, 76 So.2d 194 (1955); Section 99-35-145(9), Mississippi Code of 1972; Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979). A prisoner must use due diligence in the presentation of his petition, and delayed, successive, or dilatory petitions are barred. Wetzel vs. State, supra; In re Broom's Petitione, [sic] supra; Holloway vs. State, supra; Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979).

C. Petitioner is barred from complaining about sentencing instructions.

Petitioner asserts the trial judge failed to define mitigating or aggravating circumstances to the jury, and, therefore, his sentence of death must be set aside.

The Mississippi contemporaneous objection rule precludes this issue. Because there was an express waiver at the trial court level to the instruction pertaining to consideration of mitigating circumstances, no error could have been assigned based on this point on direct appeal (Rule 42, Mississippi Supreme Court Rules) or in a post-conviction context before the Mississippi Supreme Court. Holloway vs. State, supra. Nor can the trial judge be put in error for his failure to instruct on any point of law unless he is specifically requested to do so. Newell vs. State, 308 So.2d 71 (Miss. 1975). See also: Ivory vs. State, 336 So.2d 732 (Miss. 1976); Gangloff vs. State, 232 Miss. 395, 99 So.2d 416 (1958).

Gray vs. Lucas, supra, has recently held that under Newell, the failure to request an instruction precluded petitioner from raising the point under state law. This independent

and adequate state procedural ground precludes petitioner from raising the claim on habeas review absent a showing of "cause" and "actual prejudice." 677 F.2d at 1109. The rule of Wainwright vs. Sykes, supra, fully applies here. Petitioner did not object to the sentencing instruction given nor did he request further instruction on the definition of terms.

Considering the instruction, for argument alone, it is apparent that the aggravating and mitigating circumstances were fully defined. See: R. 1424-1426, Instruction 20. Petitioner's argument as to the vagueness of the third aggravating circumstance (especially heinous, atrocious or cruel) was also answered adversely to his position by Gray vs. Lucas, supra.

Petitioner argues that further definition should have been given for "pecuniary" when requested by the jury. Elsewhere Petitioner

charges that counsel was ineffective for not objecting to the granting of an instruction defining "pecuniary." The inconsistency of these arguments is apparent.

V. Petitioner was not denied effective assistance of counsel.

To prompt review of claims of ineffective assistance of counsel, a habeas petitioner must demonstrate by sufficient factual proof an identifiable lapse on the part of trial counsel, and some actual adverse impact upon the fairness of his trial which results from that lapse. Daniels vs. Maggio, supra; Boyd vs. Estelle, 661 F.2d 388 (5th Cir. 1981); Washington vs. Watkins, 655 F.2d 1346 (5th Cir. 1981). The mere showing of a possibility

of prejudice is not sufficient for habeas relief. Haggard vs. State of Alabama, 550 F.2d 1019 (5th Cir. 1977). The standard is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Herring vs. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). The determination of whether counsel rendered reasonably effective assistance turns in each case on the totality of facts in the entire record. Washington vs. Estelle, 648 F.2d 276 (5th Cir. 1981); United States vs. Gray, 565 F.2d 881 (5th Cir. 1978). The Court must consider a counsel's performance in the light of "the number, nature, and seriousness of the charges . . . the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses." Washington vs. Watkins, supra, at 1357. In this context,

attorneys are not held to a higher standard in capital cases. Washington vs. Watkins, supra; Gray vs. Lucas, supra.

Although a precise definition of prejudice has never been formulated in this circuit, both the Fifth Circuit and the United States Supreme Court have addressed the question. In Nelson vs. Estelle, 642 F.2d 903 (5th Cir. 1981), the Court distinguished between two types of "prejudice": (1) that which might affect the jury verdict, and (2) that which renders the trial as a whole "fundamentally unfair."

Several of the grounds assigned by Petitioner fall within what several courts have referred to as "the amorphous zone known as 'trial strategy' or 'judgment calls.'" Winfrey vs. Maggio, 664 F.2d 550 (5th Cir. 1981); Jones vs. Estelle, 632 F.2d 490, 492 (5th Cir. 1981). In this context, as pointed out previously, "a conscious and informed decision

of trial tactics cannot be the basis for constitutionally ineffective representation unless it is so ill chosen that is [sic] permeates the entire trial with obvious unfairness." Daniels v. Maggio, supra at 1079. Tactical decisions do not constitute ineffective assistance of counsel simply because in retrospect it is apparent that counsel chose the wrong course. Askridge vs. Hopper, 545 F.2d 457 (5th Cir. 1977); Daniels vs. Maggio, supra. The alternatives counsel faced must be considered, and then from the perspective of one standing in the shoes of trial counsel. A petitioner must demonstrate that the advice or course of faction followed was not within the range of competence demanded of attorneys in criminal cases. Beckham vs. Wainwright, 639 F.2d 262 (5th Cir. 1981).

Turning to Petitioner's specific claims noted in his brief they may be divided as follows:

A. TRIAL STRATEGY:

1. Failure to investigate or call character witnesses during guilt phase to testify as to petitioner's reputation for truth and veracity and also for peace and violence and failure to call witnesses in sentencing phase to testify concerning mitigating circumstances.

2. Failure to object to instructing the jury on definition of "pecuniary gain".

3. Failure to object to dismissal of jurors for cause for having conscientious scruples against the death penalty.

B. CLAIMS NEVER RAISED IN STATE COURTS OR PLED HEREIN:

1. Failure to object to one comment made by the District Attorney during closing arguments.

C. OTHER CLAIMS:

1. Counsel failed to advise petitioner of an offer of leniency for his testimony against his co-defendant, Ricky Tucker.

2. The Court improperly denied petitioner's motion for appointment of a criminologist and a psychiatrist to assist in preparation of the defense.

A. Matters Falling Under Trial Strategy

1. Failure to investigate and the failure to call character witnesses.

It goes without saying that trial counsel has an obligation and duty to conduct an investigation of a sufficient nature to make an informed evaluation of potential defenses and to present effectively his client's case. Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978); Gomez vs. Beto, 462 F.2d 596 (5th Cir. 1972). Counsel, however, is not required to pursue every path until it bears fruit or until

all conceivable hope withers. Lovett vs. State of Florida, supra.

Clearly, complaints of uncalled witnesses fall within the ambit of "trial strategy." Buckelew vs. United States, 575 F.2d 515 (5th Cir. 1978); United States vs. Doran, 564 F.2d 1176 (5th Cir. 1977); Haggard vs. State of Alabama, supra. Therefore, in order to succeed on the first two points Petitioner must meet the test formulated in Gray vs. Lucas, supra, at 1092-1093: there must be a showing of (1) a failure to investigate adequately and (2) prejudice arising from that failure.

During the evidentiary hearing, Petitioner produced three witnesses: Mrs. Ollie Brown, Mrs. Jean Orr, and T. C. Farnsworth. None of the proffered witnesses was an eyewitness to the crime. Other than being new faces, these witnesses would have added nothing to the defense. The testimony of the witnesses was of

dubious value: one was unfamiliar with petitioner's arrest record and the fact that he had spent time on the county farm; one had not seen him since 1973; one equivocated greatly on cross-examination.

Both Evans and Brantley testified that neither Bullock nor his family provided any of the names of witnesses on the list introduced at this hearing. Bullock, on the other hand, testified that he gave Evans such a list. Both Evans and Brantley indicated that if a list had been produced they would have attempted to call those whom they felt would have been helpful. The Court is inclined to believe the two attorneys and finds that no list was produced or names submitted by the Petitioner.

Finally, Petitioner raises a question concerning the use of character witnesses at both the guilty and sentencing phases to verify Petitioner's reputation for truth and

veracity. Evans testified that he felt that testimony of this nature was of questionable value and that he rarely used it, that he instead used corroborative witnesses as their testimony shored up the Petitioner's story of the events of the evening. This being a matter of trial strategy, the Court does not find it error or a denial of effective assistance of counsel.

2. The definition of "pecuniary gain."

Petitioner seeks to hold trial counsel ineffective for failure to object to the Court's definition of "pecuniary gain" as that term was used in the second aggravating circumstance. Assuming that the failure to object did constitute ineffective assistance, there was no prejudice because the jury found only the first and third circumstances present, i.e., (1) the murder was committed while in the course of the commission of robbery and (2) the

murder was especially heinous, atrocious or cruel. Petitioner can show no "actual prejudice." Washington vs. Watkins, supra; Gray vs. Lucas, supra; Haggard vs. State of Alabama, supra; Nelson vs. Estelle, supra; Davis vs. State of Alabama, supra; Daniels vs. Maggio, supra.

3. Failure to object to exclusion of jurors for cause for having conscientious scruples against the death penalty.

Petitioner claims that trial counsel was ineffective for his failure to object to the dismissal for cause of certain jurors who expressed conscientious scruples against the death penalty. A review of the voir dire proceeding included in the record shows that only those jurors who stated that under no circumstances would they vote for the death penalty were challenged for cause. No objection was voiced by the defense to the

challenges for cause, and these challenges comport with holding in Witherspoon vs. Illinois, 391 U.S. 510, 88 S.Ct. 1770, _____ L.Ed.2d ____ (1968). This point, then has no merit.

B. Claims never raised in state courts or pled herein.

Petitioner's claim that counsel erred when he failed to object to prosecutions' comments during closing argument appears for the first time in these proceedings. This ground was not raised in the trial court and cannot be raised for the first time here.

Federal habeas applicants may not proceed on one legal theory in state court and then move to a completely new theory in the federal arena. Picard vs. Connor, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971); Lamberti vs. Wainwright, 513 F.2d 277 (5th Cir. 1975);

Singleton vs. Estelle, 492 F.2d 671 (5th Cir. 1974); 28 U.S.C. §2254(b)-(c).

Inasmuch as Petitioner's claims would be barred in state court by Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac., his failure to raise it in his motion for collateral relief precludes his raising this claim here, absent a showing of "cause" and "actual prejudice." Engle vs. Isaac, supra. No such showing has been made.

C. Other claims.

1. Failure to advise petitioner of offer of leniency.

During the hearing, Petitioner withdrew his complaints on this point; therefore, this claim is dismissed.

2. Failure to provide experts to assist in trial.

The proposition concerning the failure to appoint experts to assist in the preparation of

trial is couched in terms of discrimination based upon economic status. Griffin vs. Illinois, 351 U.S. 12 (1956). Petitioner asserts that he was denied effective representation as a result of this alleged discrimination.

Griffin does not automatically entitle an indigent to an investigator. The Fifth Circuit has held that "when requesting investigative services, a defendant must show specifically the reasons why the services are necessary." United States vs. Davis, 582 F.2d 947, 951 (5th Cir. 1978).

Trail counsel never specified the cost, purpose or value of an investigator, and Petitioner has not proved by credible evidence what these experts would have testified to or what they would have discovered. Lovett vs. State of Florida, supra. There having been no timely showing of the necessary facts, the

state courts, having virtually followed the federal rule, cannot be held in error.

Petitioner particularly complains about the failure of counsel to call Dr. Woodliff. Dr. Woodliff was not called at this hearing, so the Court can only speculate as to what he would have testified.

Evans testified that the treating physician was present and ready to testify; however, because the hospital records were introduced, Evans chose not to use the doctor because he would have testified that petitioner's fever and pain would not have affected his ability to give a free and voluntary confession. This cannot be deemed ineffective assistance.

As for the serologist, Brantley testified that he specified the name of the expert, his estimated fees, and the general nature of the proposed inquiry, but deliberately withheld

informing the court as to the specific nature of the testimony he intended to elicit, a conscious trial tactic. Evans and Brantley testified that the evidence concerning the blood corroborated Petitioner's story about the events of the evening, but failed to produce at the hearing any testimony concerning what an expert would have found.

As for the failure to move for a mistrial, a hearing was conducted on that point on the Motion for a New Trial, where the testimony showed that the non-disclosed tests and reports were inconclusive.

This court has been shown no prejudice arising from the failure to appoint experts or move for a mistrial; therefore, this point must fail.

D. Ineffective assistance of counsel does not satisfy the "cause" requirements of Wainwright vs. Sykes, supra.

Petitioner cites Voyles vs. Watkins, 489 F. Supp. 901 (N.D. Miss. 1980), for the proposition that ineffective assistance constitutes "cause" for Wainwright vs. Sykes purposes. This proposition has been rejected by the Fifth Circuit on three different occasions. See, Lumpkin vs. Ricketts, 551 F.2d 680 (5th Cir. 1977); Washington vs. Estelle, 648 F.2d 276 (5th Cir. 1981); Tyler vs. Phelps, 643 F.2d 1095 (5th Cir. 1981).

E. Conclusion

Based upon a totality of the proceedings there is no basis for finding that trial counsel did not provide reasonably effective assistance. This ground is meritless and is hereby dismissed.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## VI. Psychiatric Examination

Petitioner was examined by a psychiatrist at the Jackson Mental Health Center, upon court order. The psychiatrist concluded:

> I can find no information on my examination as to indicate a psychotic disorder or other mental disorder so as to grossly interfere with the patient's ability to differentiate right from wrong. He has excellent memory into the events of his alleged crime and psychiatrically I can see of little available to him in the way of a defense plea.

Dissatisfied with this report, Petitioner requested further examination during a motion hearing prior to trial on May 7, 1979. The trial court granted this request, but counsel did not pursue the matter until the day trial began.

On May 22, 1979, when court convened for trial, defense counsel stated they were not ready for trial because they had been denied their motion for experts, including a psychiatrist. Counsel stated that the psychiatrist was to "help assist on the case" (R. 176) by either sitting in on the trial or assisting prior to trial in preparing the defense, not for the purpose of examining Petitioner.

No explanation was given for the failure to have Petitioner re-examined prior to trial. After reading the report of the sole examining psychiatrist, the court concluded that there was no indication of incompetency nor reason to delay the trial.

The trial record in this case shows that counsel never suggested that Petitioner had difficulty understanding the proceeding against him or that he lacked the ability to cooperate

or consult with him or assist in his own defense. Nothing in the trial transcript suggests that Petitioner's demeanor would give the trial court reason to order further examination. This, plus the psychiatrist's opinion before the court, indicates the trial court was correct in denying further examination upon the naked allegations of trial counsel that the examination was incomplete.

This question has not been raised in the context of ineffective assistance and there has been no allegation based on this ground in state court. Petitioner is now precluded from raising this in state court (Rule 8.07 Miss. Unif. Crim. R. Cir. Ct. Prac.; Engle vs. Isaac, supra), and it can serve as no basis for habeas corpus relief on this ground.

VII. Petitioner has no absolute right to a presentence report.

Petitioner's claim that he was denied due process and equal protection by the failure of the trial court to order a presentence report is without merit. The identical issue was decided adversely to Petitioner's position in the recent case of Gray vs. Lucas, supra; petitions for rehearing and rehearing en banc denied. 685 F.2d 139 (5th Cir. 1982).

VIII. Remaining claims in petition are waived.

The remaining claims were neither briefed nor argued during the evidentiary hearing are are, therefore, abandoned. Gray vs. Lucas, supra.

This Court has carefully and earnestly examined all of the applicable documents

furnished it in connection with this application for writ of habeas corpus. Absolutely no error has been found which could be considered to rise to Constitutional proportions.

The petitioner here was afforded every right, protection and safeguard secured to him by the Constitution of the United States throughout the proceedings in regard to this outrageous and egregious crime. Great wrongdoing demands great punishment. This Court finds nothing herein deter the petitioner from the ineluctable result of his own misdeeds.

An order denying petitioner's application

for a writ of habeas corpus shall be presented within the time prescribed and required by the rules of this Court.

/S/ John R. Countiss, III
UNITED STATES MAGISTRATE

Jackson, Mississippi
June 29, 1983

IN THE SUPREME COURT OF MISSISSIPPI

NO. 51,937

CRAWFORD BULLOCK, JR.

V.

STATE OF MISSISSIPPI

EN BANC.

LEE, JUSTICE, FOR THE COURT:

Crawford Bullock, Jr. was indicted at the November 1978 Term of the Circuit Court, First Judicial District, Hinds County, for the capital murder of Mark Dickson, while committing the crime of robbery against Dickson. A bifurcated trial was held during the May 1979 Term of said court, Honorable William F. Coleman presiding, and the jury returned a guilty verdict of capital murder at the conclusion of the first phase of the

trial. A separate sentencing phase was held following the guilty verdict, and, after deliberation, the jury returned a verdict imposing the death sentence as punishment for the crime. Bullock has appealed here and has assigned and argued twenty-eight (28) errors in the trial below.

On the evening of September 21, 1978, Crawford Bullock, Jr. and Ricky Tucker went to Town Creek Saloon, where they drank alcoholic beverages during the night. When Bullock and Tucker decided to leave in the early morning of September 22, they discovered that the person, with whom they had ridden there, had left them. Mark Dickson was leaving the place and he offered to give them a ride home in the gray Thunderbird automobile he was driving.

On the way home, Bullock had Dickson to stop at a convenience store in order for him to buy some bread. Dickson gave Bullock

thirty-five (35¢) for that purpose, but the money was returned when it was found the store had no bread.

Dickson drove on at his riders' instructions. Bullock asked him to stop the automobile in order that he could answer a call of nature. Upon returning to the vehicle, Bullock overheard an argument between Tucker and Dickson and heard Tucker say, "Don't make me pull this gun," and he heard Dickson say that he did not have any money but that they could have the automobile. All three re-entered the vehicle, the argument continued, and Dickson stopped on Byrd Drive near a construction site where blows were exchanged between Tucker and Dickson. Tucker told appellant to grab Dickson, which he did. Dickson broke away and left the vehicle. Tucker got out with a whiskey bottle, using it as a club, and advanced toward Dickson who fled

with Tucker in pursuit. Tucker tackled Dickson; appellant caught up with them and grabbed Dickson by the head. Tucker struck Dickson on the head with the whiskey bottle which also hit Bullock's hand, broke and cut it. Tucker beat Dickson with his fists, knocked him to the ground, kicked him in the head as he lay on the ground and then repeatedly struck him with a concrete block on the head which resulted in his death. Appellant went across the street to an automobile agency and tried to start one of the vehicles on the outside of the building to no avail.

Tucker suggested that they burn the body and the car, but appellant told him that he knew of a lake near Byram where the body could be disposed of. Dickson's body was loaded into the car, and they drove to a car wash, where the blood was washed away. Tucker removed

Dickson's wallet from the body, went through it, found no money and disposed of it in a garbage can. Appellant drove the vehicle to his home, where they cleaned up, obtained a garden hose and then drove to the lake near Byram. Dickson's outer clothing was removed, concrete blocks were placed in his T-shirt and shorts, the garden hose was wrapped around the body and the weights, and Tucker pulled the body out into the lake and submerged it. Appellant also went into the lake, felt of the body with his feet, making sure that it was submerged and stuck in the mud at the bottom of the lake.

Appellant and Tucker returned to Jackson and to appellant's home, again cleaned up, and appellant took Tucker home, then went to the University Medical Center where he obtained medical attention for his hand. The next day Tucker and he drove in the Dickson automobile

to McComb for the purpose of visiting appellant's grandfather. They failed to find him and returned to Jackson. Appellant retained possession of the automobile.

During the early morning hours of September 23, 1978, appellant began to have pain in his hand, and he returned to University Medical Center, driving the Dickson automobile, where he obtained prescriptions for his injury. On his way home from the hospital, he was stopped by officers of the Jackson Police Department, was arrested, and was taken to the police station. On being stopped and asked about the automobile he was driving, appellant responded that he had borrowed the automobile from a friend. While Dickson was driving the vehicle on the night of his death, the registration tag was on the back seat of the car and when Bullock was stopped, it had been placed on the tag mount outside the car.

At the police station, appellant made incuplatory oral and written statements about the commission of the homicide, which substantially set forth the facts related hereinabove.

## GUILT PHASE

### I.

Did the court err in finding that appellant's oral and written statements were freely and voluntarily given?

Appellant moved to suppress all statements made by him while in custody of the officers, contending that the statements were inadmissible because they were not freely and voluntarily given. He was held in the Jackson City Jail for approximately nine (9) hours after his arrest and at the end of that period, he was questioned by Detective Fondren and

Officer Jordan about the homicide. Appellant executed a written waiver of his constitutional rights, and afterwards, gave an oral statement to the officers setting out his involvement in the crime. The statement was reduced to writing and was signed by the appellant. A pre-trial suppression hearing was conducted, the officers present when the statements were made testified that appellant was advised of his constitutional rights prior to making the statement, that he acknowledged understanding them and executed a written waiver thereof. The oral statement made to the officers was typed up by Detective Fondren, was read by the appellant, and was then signed by him.

Appellant denied that the statements were freely and voluntarily made and contends that the officers withheld medical treatment for his injured hand until he gave the statements. The officers testified that appellant did not

complain of pain with his hand until they had completed the interrogation. They offered medical assistance to him, but appellant insisted on getting through with the statement first, and that he then go to the doctor. The officers testified that appellant was alert and coherent, and that he was not under the influence of medication or pain. After the officers received the statements, appellant was taken to the hospital. His temperature was $103^0$, he was treated, and remained in the hospital for one week.

Detective Fondren visited appellant while he was in the hospital and, after again being advised on his constitutional rights, appellant told Detective Fondren that on the night of the homicide Tucker and he were high on drugs and beer and the only explanation he could have for killing Dickson was that Tucker was trying to rob him. Security Officer King was outside the

hospital room and he could see Detective Fondren talking to appellant, but he could not hear what was being said. They both testified that his statement was given freely and voluntarily.

After appellant testified, the officers were placed on the stand in rebuttal, and testified that the Miranda rights were given, the statements were freely and voluntarily made, and that the appellant knew what he was doing when he made the statements and executed them. The procedure outlined in Agee v. State, 185 So.2d 671 (Miss. 1966) was strictly followed, and the trial judge held that the statements made by appellant were freely and voluntarily given. The court's finding was supported by the evidence, and we cannot overrule or disturb that finding. Clemons v. State, 316 So.2d 252 (Miss. 1975).

Appellant testified in his own defense at both phases of the trial. His testimony was practically identical with that of his statements, and reiterated and enlarged upon those statements.

II.

Did the trial court err in refusing to sustain defendant's demurrer to the indictment?

Appellant contends that the indictment here was faulty and subject to demurrer for the reasons that it did not set forth the necessary and essential elements of the crime of robbery, and did not refer to the proper statute [Mississippi Code Annotated §97-3-19(2)(e) (Supp. 1979)], to charge the crime of capital murder.

The same question was raised in Bell v. State, 360 So.2d 1206, 1208-09 (Miss. 1978), wherein the Court held that the indictment,

such as here, was sufficient to give the accused fair notice of the crime charged in clear and intelligible language. See also Culberson v. State, 379 So.2d 499 (Miss. 1979); Bell v. State, 353 So.2d 1141 (Miss. 1977). The trial court properly overruled the demurrer.

III.

Did the trial court err in refusing to grant appellant's requested circumstantial evidence instructions?

Appellant contends that the trial court should have granted the circumstantial evidence instructions requested by him. Such instructions should be given only in a purely circumstantial evidence case. DePriest v. State, 377 So.2d 615 (Miss. 1979). The case sub judice does not come under that classification because there was direct

evidence consisting of the statements made by appellant and his own testimony adduced in the trial on the guilt phase of the case. See McCrary v. State, 320 So.2d 806 (Miss. 1975).

The trial court granted an instruction known as the "two-theory instruction" which should not be given, except in purely circumstantial evidence cases. Thus, even though appellant was not entitled to circumstantial evidence instructions, he received the benefit of the principle by the two-theory instruction granted by the court.

IV.

Did the trial court err in refusing to grant appellant's requested peremptory instruction and in refusing to reduce the charge to manslaughter?

In passing upon a requested peremptory instruction, or motion for directed verdict, in

a criminal case, all evidence most favorable to the State, together with reasonable inferences, are considered as true and evidence favorable to the appellant is disregarded. If such evidence will support a guilty verdict, the request for peremptory instruction must be denied, as well as the motion for directed verdict. Warn v. State, 349 So.2d 1055 (Miss. 1977); Toliver v. State, 337 So.2d 1274 (Miss. 1976).

In the case sub judice, appellant argues that there was no evidence of intent to rob Dickson and that appellant was an unwilling participant in the robbery-homicide. The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson and in removing and discarding his wallet and personal effects therein, and in the taking of the T-bird

automobile, which was in the lawful possession and use of Dickson.

The trial court did not err in refusing to grant the peremptory instruction of not guilty. Likewise, the court committed no error in declining to reduce the charge from capital murder to manslaughter. Even so, the question of manslaughter was submitted to the jury upon a proper instruction.

V.

Did the trial court err in refusing to exclude the testimony of certain State's witnesses on the ground that the witnesses discussed their testimony with other witnesses prior to trial and violated the sequestration rule?

Appellant contends that Officer Jackson changed her testimony between the time of the suppression hearing and the date of trial, that

at the pre-trial hearing, she testified appellant was handcuffed after his arrest, and, at the trial, she was not sure whether he had been handcuffed. Appellant claims that the change in Officer Jackson's testimony was the result of talking with other officers subsequent to the preliminary hearing.

An examination of the record does not support the argument of appellant on this matter, and indicates that any difference in Officer Jackson's testimony resulted from the manner in which questions were phrased to her. There is no indication of prejudice resulting to the appellant, and, if there was a violation of the sequestration rule, the court has discretion in admitting the witness's testimony, particularly where, as here, there was no prejudice. Ford v. State, 227 So.2d 454 (Miss. 1969).

VI.

Did the trial court err in refusing to grant appellant's motion for appointment of a criminologist or criminal investigator and a psychiatrist to assist in preparation of the defense?

Appellant says that he was denied a fair trial because the lower court overruled his motions to employ various experts. Appellant filed a motion for psychiatric and psychological examinations at the Jackson Mental Health Center. The motion was granted and an examination was conducted. Appellant then requested that another psychiatrist examine him; the court heard the motion and granted same. The record does not indicate whether the examination was conducted.

Appellant also filed a motion requesting that the court pay for the expenses of his own

pathologist, which was substituted for a motion to employ a criminal investigator. The appellant did not outline any specific costs for such an investigator, and did not indicate to the court in any specific terms as to the purpose and value of such an individual to the defense. We are of the opinion that the lower court committed no error in declining to authorize expenses for employing such expert and investigator. Davis v. State, 374 So.2d 1293 (Miss. 1979); Laughter v. State, 235 So.2d 468 (Miss. 1970).

VII.

Did the lower court err in admitting photographs of the deceased during trial?

The State offered in evidence, and the lower court admitted, black and white photographs of the victim after he had been slain. Appellant claims that the pictures were

inflammatory and had no probative value. The photographs showed how the body was weighted with concrete blocks and how the garden hose was wound around it to hold the blocks in the body for the purpose of submerging it. The condition of the body, as reflected by the photographs, corroborated the testimony of the pathologist, particularly concerning the wounds upon the body.

The trial judge has wide discretion in admitting photographs into evidence, and we are of the opinion that he did not abuse his discretion in admitting the photographs of the victim. Irving v. State, 361 So.2d 1360 (Miss. 1978); Mallette v. State, 349 So.2d 546 (Miss. 1977).

VIII.

Did the trial court err in admitting the testimony of Dr. Galvez and in referring to a photograph introduced by his testimony?

Appellant argues that the evidence of the pathologist, Dr. Galvez, was cumulative and was not necessary to prove the corpus delicti, since the crime had been established by previous witnesses. Appellant relies upon Jackson v. State, 337 So.2d 1242 (Miss. 1976) for the principle that the State's use of a pathologist's testimony is unnecessary to prove corpus delicti where the deceased was found in an unusual place under unusual circumstances. However, Jackson does not support his argument on this point. The pathologist's testimony was proper and beneficial to establish the exact cause of death, which resulted from a fracture of the victim's skull. It further reflected that absence of water in the lungs indicated death to be due to the head injury rather than

drowning. The testimony and evidence were properly admitted.

IX.

Did the trial court err in allowing certain witnesses to testify and in violating the bifurcated trial principle mandated by Jackson v. State?

Appellant contends that the court erred in allowing Larry Keen, W. L. Moss and James Jones to testify about conversations they had with Mark Dickson the night he was killed. Appellant says that such testimony, together with the photographs, should not be introduced during the quilt phase of the trial, and, if at all, only during the sentencing phase. The testimony of such witnesses was to the effect that Dickson stated he was not in the mood for drinking and that he was going home because he did not have any money on him. Appellant's

attorney conducted a rigid cross-examination of those witnesses concerning what Dickson had told them. The direct examination and the cross-examination were not prejudicial to appellant, and there is no merit in the assignment. Stringer v. State, 279 So.2d 156 (Miss. 1973); Fielder v. State, 235 Miss. 44, 108 So.2d 590 (1959).

X. - XI.

Did the trial court err in not permitting appellant to cross-examine witnesses as to Mark Dickson's character and did it err in refusing to grant a mistrial?

Did the trial court err in allowing Larry Keen and James Jones to testify to the good character and habits of Mark Dickson and in not declaring a mistrial when Larry Keen mentioned the bad character of appellant and in not allowing defense counsel to cross-examine those

witnesses as to the bad character of Mark Dickson?

Assignments of error IX, X and XI involve substantially the same question(s). The witnesses mentioned above testified to statements made by Dickson, which have been covered in Assignment IX and which do not constitute reversible error.

Appellant contends that the State attacked the character of appellant by the following question and answer:

> Q. Did Mark Dickson, to your knowledge, know either Rickey Turner or Crawford Bullock?
>
> A. I think he knew Bullock. He knew Bullock because Bullock was raised in our neighborhood and we had seen him before out. I was with Mark at the Zodiac Lounge and Crawford [Bullock] was engaged in a fight there and we saw him there, you know.
>
> BY MR. EVANS:
>
> Your Honor, I am going to object to this and move for a mistrial --

ask that that be stricken from the record and move for a mistrial. This is absolutely irrelevant. The testimony is inadmissible, it's prejudicial and it's just not supposed to be in this case.

BY THE COURT:

Members of the jury, disregard the last statement that the witness made. Do all of you tell me that you can disregard the last statement?

(Jurors nodding affirmative).

The trial judge sustained appellant's objection to the question and answer, and instructed the jury to disregard the answer, and asked the jury if they could disregard it. The jury gave the judge an affirmative reply. The answer was not responsive to the State's question, the trial judge directed the jury to disregard the question and answer, and it does not constitute reversible error. Holifield v. State, 275 So.2d 851 (Miss. 1973); Hughes v. State, 179 Miss. 61, 174 So. 557 (1937); Dabbs

v. Richardson, 137 Miss. 789, 102 So. 769 (1925).

XII.

Did the trial court err in permitting witnesses to testify as to the ownership of the automobile driven by Mark Dickson on the night of the homicide?

Appellant contends that the court erred in permitting Larry Keen to testify about the ownership of the gray T-bird automobile Dickson was driving the night of the homicide. It is undisputed that Dickson was in possession of the said automobile. An indictment charging robbery or larceny of property is properly laid in the party having possession, either as owner, bailee or agent. Mahfouz v. State, 303 So.2d 461 (Miss. 1974); Minneweather v. State, 55 So.2d 160 (Miss. 1951). The assignment is without merit.

XIII.

Did the trial court err in permitting introduction of the high school photograph of Mark Dickson?

Appellant objected to its introduction on the ground that it was irrelevant and inflammatory. The trial judge did not abuse his discretion in admitting the photograph. Voyles v. State, 362 So.2d 1236 (Miss. 1978); May v. State, 199 So. 2d 635 (Miss. 1967).

XIV.

Did the trial court err in granting Instruction #15, which was the capital murder instruction?

Appellant cites no authority on this assignment, but simply argues that it was erroneously given for the reason that there was

no requirement for the jury to find Mark Dickson was in fact killed. The pertinent part of the instruction follows:

> "[A]nd, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in consert [sic] with another, while present at said time and place by consenting to the killing of the said, Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the death of the said Mark Dickson, . . ." (Emphasis added)

It may be noticed that the instruction does require a finding that Mark Dickson was killed, and it correctly sets forth the issues which must be decided by the jury before the

accused could be convicted. Williams v. State, 317 So.2d 425 (Miss. 1975).

Assignments of Error XV through XXIV deal with the refusal of the trial court to grant certain instructions requested by the appellant. Was it error to refuse those instructions?

XV.

Instruction D-8 was the single juror instruction. The appellant argues that the instruction was "a fair and accurate representation of the law" and should have been granted. The principle of the instruction was covered in Instruction #12, and, although in different language, it was not error to refuse the instruction. Reagan v. State, 318 So.2d 879 (Miss. 1975).

XVI.

Instruction D-9 was condemned in McNamee v. State, 313 So.2d 392 (Miss. 1975) as being an improper comment on the weight and worth of the defendant's testimony and was properly refused.

XVII.

Instruction D-10 was correctly refused by the lower court since it should be given only in a purely circumstantial evidence case.

XVIII.

Instruction D-30 would have told the jury that it need not find any mitigating circumstances in order to return a sentence of life imprisonment; that a life sentence may be returned regardless of the evidence. The

instruction was in direct conflict with Instruction D-20 which told the jury to weigh the mitigating circumstances against any aggravating circumstances before returning a verdict and was correctly refused under Jackson v. State, supra.

XIX.

Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions.

XX.

Instruction D-33 would have instructed the jury it was to presume that, if the accused was sentenced to life imprisonment, he would spend the rest of his life in prison, and the jury was to presume that, if the accused was sentenced to death, he will receive lethal gas until he is dead. The instruction was improper and was calculated to confuse the jury.

XXI.

Instruction D-34 and the sense of same, was contained in Instruction #14, which was granted by the court, and it was not error to refuse D-34.

XXII. - XXIV.

Instructions D-35, D-36 and D-37 did not put the lower court in error for their refusal. They were either improper instructions, or the proper and correct parts were included in Instruction #14 granted by the court.

XXV.

Did the court err in failing to sustain appellant's motion for a mistrial made during the State's closing argument and in not sustaining objections to prejudicial and inflammatory arguments of the district attorney?

Appellant contends that, during closing argument, the district attorney referred to his problem with psychosis as being a possible explanation for committing the crime. He

objected to the remark and stated that such remark was not supported by the evidence. However, appellant himself introduced in evidence the hospital record of appellant which indicated that on May 15, 1978, he was admitted to the University Medical Center for treatment and the diagnosis indicated that he suffered from psychosis. Such evidence was fair comment in the argument by the district attorney.

Appellant next argues that the district attorney gave a false impression to the jury of the elements of the crime of robbery. Part of the argument follows:

> "Now, look, if you see a guy on the street, do you walk up and whop him on the head and drop boulders on him and hit him with a two by four and then you take his billfold and you take his car, but you didn't rob him. Do you believe that?"

The trial judge overruled the objection and stated that it was final argument. There

is wide latitude for attorneys to argue cases to juries, and we do not think that such remarks of the district attorney were improper or prejudicial.

Appellant objects to argument of the district attorney, which he says was improper because it indicated that fingerprints could not be taken from all the evidence. There was testimony that it was impossible to remove latent fingerprints from concrete and certain other materials introduced in evidence. This was fair argument, and did not constitute error.

Appellant lastly objects to the district attorney's reference to the statement made by appellant to the investigating officers as being a confession.

The statement was incriminating, connected appellant with the crime, and may properly be referred to as a confession. Also, during the

trial of the case, appellant's own counsel referred to the statement as being a confession. There is no merit in the contention.

XXVI.

Did the lower court err in denying appellant's motion for a recess until the following morning before proceeding to the sentencing phase of the trial?

The jury returned a verdict of guilty of capital murder in the first phase of the trial at approximately 8:00 p.m. The jurors had eaten supper at that time. The trial judge indicated his desire to proceed with the sentencing phase of the case, whereupon, appellant moved the court to recess until the following morning for that purpose. The trial judge asked the jury whether any of them were too tired to proceed, they indicated that they

were not, and the judge assured the jury that, if they became tired at any time, he would stop the proceeding and retire for the evening. The trial proceeded in the sentencing phase and the jury returned a verdict for the death penalty at approximately 11:00 p.m. The facts of the case sub judice may be distinguished from that of Thornton v. State, 369 So.2d 505 (Miss. 1979) where two of the defendant's attorneys, one approximately seventy (70) years old and one in ill health, were not able to properly function because of their infirmities. The attorneys were also restricted in their final argument to short periods of time.

Here, appellant was not restricted in any manner in the presentation of his defense, the record reflects that he was not prejudiced by proceeding into the sentencing phase and that he had a fair trial. The lower court proceeded

under the guidelines of Jackson v. State, and there was no error in so doing.

XXVII.

Was the verdict of the jury contrary to the overwhelming weight of the evidence and did it evince bias, passion and prejudice?

The sense and principle of this assignment of error has been discussed in Assignment IV, wherein the appellant claimed that the court erred in declining his request for a peremptory instruction of not guilty.

As stated here, the evidence for the State, including the oral and written confessions of appellant, his testimony at the trial, and the physical evidence, unless rejected by the jury, was amply sufficient to prove beyond a reasonable doubt the guilt of the appellant and the verdict was not contrary to the great weight of the evidence.

XXVIII.

Did the lower court err in overruling appellant's motion to quash the indictment and in declining to declare the statute unconstitutional?

This Court has spoken on the constitutionality of the death penalty statute and has determined that the statute, as implemented by the legislature and construed by the court, is constitutional. In Coleman v. State, 378 So.2d 640 (Miss. 1979), the Court said:

> "This contention is without merit. The constitutionality of the death penalty as imposed under Section 99-19-101, seq. has been firmly established. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1876); Washington v. State, 361 So.2d 61 (Miss. 1978)." 378 So.2d at 647.

In our opinion, there were no reversible errors in the guilt phase of the trial and the case should be, and is, affirmed.

SENTENCING PHASE

Mississippi Code Annotated Section 99-19-105 (Supp. 1979) provides the following:

> "(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by he Mississippi Supreme Court, a copy of which shall be served upon

counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to

review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal error enumerated, the factual substantiation of the verdict, and the validity of the sentence."

We have held in Jackson, and pursuant to the above section, that cases in which a death sentence is imposed will be automatically reviewed as preference cases by this Court; that the record will be reviewed and compared with similar cases to determine whether the punishment of death is too great when the aggravating and mitigating circumstances are weighed against each other in order to assure that the death penalty will not be wantonly or

freakishly imposed; and only will be inflicted in a consistent and even-handed manner under like or similar circumstances.

Since Jackson v. State, 337 So.2d 1242 (Miss. 1976), eleven (11) capital murder cases have been decided by this Court. Seven (7) of those cases have involved felony (robbery) murder. Reddix v. State, 381 So.2d 999 (Miss. 1980); Jones v. State, 381 So.2d 983 (Miss. 1980); Culberson v. State, 379 So.2d 499 (Miss. 1979); Irving v. State, 361 So.2d 1360 (Miss. 1978); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Washington v. State, 361 So.2d 61 (Miss. 1978); Bell v. State, 360 So.2d 1206.

We have carefully reviewed those cases and compared them with the case and sentence sub judice. Appellant contends that the extent of his involvement in the crime was as an accomplice, who did not strike the fatal blow, and that Tucker was the principal, who killed

the victim. He argues that Tucker was given life imprisonment by the jury, which tried him; that appellant should not receive a greater or harsher penalty than Tucker; and that appellant's death sentence should be reduced to life imprisonment.

In Coleman v. State, supra, Coleman was found guilty by a jury in the robbery-murder of one Burkett, and was given death. He was sixteen (16) years of age and fired the fatal shot that killed Burkett. His accomplice in the crime was permitted to enter a guilty plea to manslaughter and was sentenced to a term of years in the penitentiary. In comparing Coleman's death sentence to that of other cases heard by this Court, we said:

> "Having carefully compared the case at bar with these cases in which the sentence of death was imposed, we are of the opinion that the sentence of death in this case 'is excessive or disproportionate to the penalty

imposed in similar cases, considering both the crime and the defendant.'

In Irving, Washington and Bell, the killings were totally senseless and committed upon hapless victims unarmed and unable to protect themselves. The circumstances in this case are strikingly different. Here, Harry Burkett, the victim, upon seeing the foot of Sims protruding from under the pickup truck, began firing his pistol. Only after being fired upon did the 16-year-old Coleman shoot. Again, Coleman had the opportunity to shoot Mrs. Burkett, who was an eyewitness, but did not. He fled the scene instead.

Under the specific authorization of subsection (5)(b) of § 99-19-105, this Court affirms the conviction but reverses and sets aside the death sentence and remands this case to the trial court for modification of the sentence to imprisonment for life." 378 So.2d at 650.

In Culberson v. State, supra, Culberson was found guilty of robbery-murder and was given the death penalty. The principal evidence and witness against Culberson was an accomplice, Alvarese Pittman. His testimony was substantially to the effect that he was

with Culberson, they were going to rob the victim, that he did not know Culberson had a pistol until Culberson shot and killed the victim. On a plea of guilty, Pittman was given a comparatively light sentence in the penitentiary. The Court said, in affirming the death penalty:

> "This leaves the question of whether the words in Subsection (3)(c), 'imposed in similar cases, considering both the crime and the defendant,' include for our review and comparison the exact and therefore similar crime of the accomplice and the sentence received by him for it. We construe the language to include not only the capital cases heretofore determined by this Court in which the death sentence has been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given the death penalty and an accomplice less than death. One of the questions arising in such cases is whether a sentence of less than death to an accomplice was a result of prosecutorial discretion. An affirmative answer raises a second question, was the discretion abused?

* * * *

> We hold prosecutorial discretion was not abused because Pittman, who did not fire the fatal shot, was permitted to plead guilty to manslaughter, while Culberson, the one who fired the fatal shot, was given the death penalty. We hold the death penalty was not applied capriciously in this case. It is a proper sentence for the senseless and unprovoked murder committed by Culberson, who, after first knocking the victim down with a table leg, then shot the victim while he was lying on the ground begging, 'Help me, help me.'" 379 So.2d at 510.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Sandra Lockett was charged with aggravated murder with aggravating specifications. She and three (3) others conspired to rob a pawnbroker's shop. Lockett remained in the getaway automobile with the engine running, the other three entered the pawn shop and during the robbery, Parker, one of the three, killed the proprietor. Prior to trial, Parker pleaded guilty to the murder charge, and agreed to testify against Lockett

and the other two. In return, the prosecutor dismissed the aggravated robbery charge and the specifications to the murder charge which limited the possibility that Parker could receive the death penalty.

Two weeks before Lockett's separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery, offenses which carried a maximum penalty of twenty-five (25) years imprisonment. Prior to the trial, he offered to permit her to enter a plea of guilty to aggravated murder without specifications, an offense carrying a mandatory life penalty. These plea bargaining offers were rejected by Lockett; she was tried and was given the death penalty.

Although the case was reversed on another ground, the question was raised as to whether or not Lockett's conviction as an aider and

abettor of the actual killer was invalid on the ground that the interpretation by the Ohio Supreme Court of the complicity provisions of the Ohio statute, under which the defendant was convicted, was so unexpected that it deprived her of her due process right to fair warning of the crime with which she was charged.

The United States Supreme Court held that her conviction as an aider and abettor of the actual killer was not invalid.

In Coppola v. Commonwealth, 220 Va. ____, 257 S.E.2d 797 (1979), the Virginia Supreme Court held that a co-defendant is not necessarily entitled to commutation of the death sentence because an equally culpable accomplice, on substantially the same evidence, has been sentenced to life imprisonment. That Court held that a determination of the proportionability of punishment requires only that the death sentence not be so

imcommensurate with his conduct, measured by other jury decisions, involving similar conduct.

In the case at bar, there is no record of the aggravating circumstances and mitigating circumstances in the trial of Tucker, and it is not possible to determine what circumstances influenced the jury in its life verdict. The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender. Jones v. State, 307 So.2d 549 (Miss. 1975); Bass v. State, 231 So.2d 495 (Miss. 1970); McBroom v. State, 217 Miss. 338, 64 So.2d 144 (1953).

When we compare the present case to other capital cases, which have been affirmed by this Court on the death penalty, the present robbery-murder is equally as wanton, cruel,

senseless, heinous and atrocious as those. The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to those crimes so as to require this Court to reduce the sentence to life imprisonment.

Therefore, the judgment of the lower court is affirmed and Wednesday, the 10th day of September, 1980, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AS TO GUILT PHASE: AFFIRMED AS TO SENTENCING PHASE.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, BROOM, BOWLING AND COFER, JJ., CONCUR.

Office-Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1236

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

*Petitioners,*

*v.*

CRAWFORD BULLOCK, JR.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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April 2, 1985

BEST AVAILABLE COPY

## QUESTION PRESENTED

Should this Court review a decision by the United States Court of Appeals for the Fifth Circuit that vacated the death sentence imposed on respondent under a Mississippi statute identified by this Court as conflicting with the requirements of *Enmund v. Florida*, 458 U.S. 782 (1982), and since amended to comply with *Enmund*?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

### A. Introduction

Respondent, Crawford Bullock, Jr., was sentenced to death by a Mississippi jury for robbery-murder under a statute and jury instructions that did not require a finding that he killed, attempted to kill, intended to kill or contemplated that lethal force be used. In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court specifically recognized the constitutional infirmity of the Mississippi statute under which respondent was sentenced to death. 458 U.S. at 789 n. 5. In a series of decisions, the Court of Appeals for the Fifth Circuit also concluded that the

Mississippi statute in effect when respondent was sentenced was constitutionally defective. The Mississippi legislature has since amended that State's capital sentencing statute to comply with the requirements of *Enmund*. Thus, respondent is one of a handful of victims of an unconstitutional capital sentencing scheme in Mississippi that has since been corrected.

Accordingly, this is a case of no precedential significance. Mississippi has corrected the constitutional infirmity of the capital sentencing statute under which respondent was sentenced to death.[1] Consequently, no similar cases will arise in the future. Moreover, the Fifth Circuit's decision was a simple application of *Enmund* to one of the very statutes identified by this Court as allowing imposition of the death penalty in the circumstances declared unconstitutional in that case. Indeed, the Court recently denied *certiorari* in a case that raised this same legal issue: a death sentence imposed under the old Mississippi statute had been vacated pursuant to *Enmund*.

Respondent could not be condemned to death if he were sentenced today under the same jury instructions. Petitioners should not be allowed one last cruel and unusual punishment before complying with the requirements of *Enmund*. As a result, this Court should deny the petition.

**B. Statement of Facts**

Respondent is a twenty-seven year old male with an honorable discharge from the military. (TR-1091).[2] Except for the matter under review, respondent has never been accused or convicted of any crime of violence. (TR-1141-43).

On the night of September 21, 1978, after an evening of drinking, respondent and Ricky Tucker were offered a ride home from the Town Creek Saloon in Jackson, Mississippi, by Mark Dickson. (TR-1097). During the ride, respondent, Tucker and Dickson continued drinking (TR-1098), and, after some

---

1 Respondent's conviction is not at issue on this petition.

2 References in this form are to pages of the trial record.

time, Tucker and Dickson began to fight. (TR-1108-09). Dickson stopped the car in an uninhabited area, and he and Tucker got out, followed by respondent, whose leg was broken and in a cast. (TR-1921, 1109). Tucker and Dickson exchanged blows. (TR-1110). Respondent intervened at the early stages of the fight. (TR-1110). The purpose of his intervention is disputed: respondent testified it was to stop the fight (TR-1110); the State argued it was to aid Tucker.

In any event, Tucker swung a liquor bottle at Dickson but hit respondent on the hand, shattering the bottle and opening a wide gash on respondent's hand, which bled profusely.[3] (TR-1110). Respondent backed away and the fight between Tucker and Dickson continued without any participation by respondent. (TR-1111). Tucker gained the upper hand, knocking Dickson down. (TR-1111). Tucker kicked Dickson in the head and jumped up and down on his head. (TR-1111). Tucker then picked up a concrete block and beat Dickson with it, killing him. (TR-1111). Tucker also picked up a wooden board and beat Dickson with that. (TR-1112). The medical evidence established that death was caused by the blows struck by Tucker with the concrete block. (TR-930; 934; 956).

There is no evidence that respondent struck any of the blows that led to Dickson's death. None of respondent's blood was found on the concrete block or the wooden board with which Tucker beat Dickson, or on Dickson's body. (TR-966-85; 1474-86). The absence of respondent's blood from the victim's body and the murder weapon is significant because respondent was bleeding profusely from his hand from the early stages of the fight between Tucker and Dickson (TR-1110), as is evidenced by the fact that his blood was found in a variety of places: a

---

[3] Petitioners' flip statement of facts is both inappropriate and inaccurate. For example, petitioners' statement that there was a "rain of blows" with the bottle (Petition at 9), is without any basis in the record and contradicts the factual recitations by the Mississippi Supreme Court (Appendix to Petition ["A"] at 71), the district court (A25) and the Fifth Circuit (A9).

trail of respondent's blood was found going some fifty yards along the street where the fight took place (TR-487); respondent's blood was found on several cars he attempted to start in order to get away from the fight between Tucker and Dickson (TR-481); his blood-soaked shirt was found at the scene (TR-415; 978); and his blood was found on the boat at the lake where Dickson's body was later hidden. (TR-1016).

Respondent and Tucker were prosecuted under the Mississippi capital robbery-murder statute because there was evidence that Dickson's car and wallet were taken. They were tried separately. Both were convicted. Tucker was sentenced to life imprisonment. Respondent was sentenced to death.

### C. The Former Mississippi Statute

Respondent was indicted and convicted under the Mississippi capital robbery-murder provision, which provided:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (e) When done *with or without any design to effect death*, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies . . . .

Miss. Code Ann. § 97-3-19(2)(e) (emphasis added) (2a).[4] Respondent was sentenced to death pursuant to the former Mississippi capital sentencing statute, Miss. Code Ann. § 99-19-101 (3a), which provided that the jury should weigh specified aggravating circumstances against specified mitigating circumstances in determining whether to impose a death sentence. The sentencing statute required that, before a defendant could be sentenced to die, all findings had to be made by the

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[4] References in this form are to the Appendix, below.

jury but did not require a finding that the defendant killed, intended to kill, attempted to kill, or contemplated that lethal force would be used.

Thus, the former Mississippi statutory scheme allowed the imposition of a death sentence in violation of the Eighth Amendment as interpreted in *Enmund*. In recognition of this fact, the Mississippi capital sentencing statute was amended in March 1983 to require the jury to make one of the *Enmund* findings before a sentence of death could be imposed. Both the former sentencing statute and the current version are reproduced below. (3a; 6a).

**D. The Jury Instructions**

The critical jury instruction was Instruction 15, delivered during the guilt phase of the trial.[5] It read, in pertinent part:

> [i]f the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in concert with another, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, *whether done with or without any design to effect the death* of the said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder.

(TR-1418-19) (emphasis added).

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5 The instructions given to the jury at the sentencing phase (TR-1428-34) contained no language whatsoever requiring the jury to find that respondent killed, attempted to kill, intended to kill, or contemplated that lethal force would be used.

## SUMMARY OF THE ARGUMENT

This is not a suitable case for *certiorari*. It has no significance beyond the immediate parties. Mississippi has corrected the constitutional defect in the statute under which respondent was sentenced; consequently, no similar cases will arise in the future. There are at most a handful of individuals in respondent's position, all of whom are victims of timing. The lower federal courts are correcting the constitutional defect of the past, and Mississippi already has corrected it for the future. Consequently, this case does not merit review by this Court. Indeed, this Court recently denied *certiorari* in a case presenting this same legal issue: a death sentence imposed under the former Mississippi capital sentencing statute was held not to comply with the requirements of *Enmund*. (Point I).

Moreover, the decision below is a simple application of this Court's decision in *Enmund*. *Enmund* held that an individual could not be sentenced to death without a finding that he killed, attempted to kill, intended to kill or contemplated that lethal force would be used. (Point II.A). As a matter of Mississippi law and of constitutional due process, that finding must be made by the jury. (Point II.B). Because the jury that sentenced respondent to death was not required to make such a finding, his death sentence was properly vacated. (Point II.C).

Consequently, the petition for *certiorari* should be denied.

## I

## THIS CASE PRESENTS NO ISSUE MERITING REVIEW BY THIS COURT

This case is of no importance beyond the immediate parties. Respondent was sentenced to death under the former Mississippi statute that allowed imposition of the death penalty

without any of the findings required by *Enmund*. Consequently, respondent's jury was not instructed to make, and did not make, any of the *Enmund* findings before sentencing him to death. The Mississippi capital sentencing statute has since been amended to require one of the *Enmund* findings before the death sentence can be imposed. As a result, no similar cases will arise in the future. Respondent is thus, one of a handful of victims of timing; his trial was held during the period of unconstitutionality in the Mississippi capital sentencing scheme.[6]

This Court has repeatedly held that the writ of certiorari is not to be granted in cases the settlement of which is important only to the parties as distinguished from the public. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 & n. 2 (1955) (citing cases in which writs of *certiorari* were dismissed as improvidently granted because "it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance"); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (writ of *certiorari* should be granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); *see also* R. Stern & E. Gressman, *Supreme Court Practice* § 4.11 at 285 (5th ed. 1978).[7] Accordingly, this Court recently denied *certiorari* in a case presenting the same legal issue where, pursuant to *Enmund*, the lower federal courts had vacated the death sentence

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6 There may be a few people in the same situation as respondent whose death sentences have not yet been vacated. Petitioners were unable to provide this information at oral argument in the Fifth Circuit. Presumably, the lower federal courts will continue to correct any such lingering, constitutionally defective death sentences.

7 Petitioners' argument that this case raises an important issue concerning the deference due findings of state courts is simply incorrect. Because Mississippi law (and due process, *see infra* at 9-10) requires all sentencing findings to be made by the jury in capital cases, the issue below was whether the jury was required to make any of the *Enmund* findings. Since the Mississippi Supreme Court made no finding on that issue, there was no finding to which deference was even arguably due.

imposed on an individual who had been sentenced under the old Mississippi capital sentencing statute by a jury that was not required to find that he killed, intended to kill, attempted to kill or contemplated that lethal force would be used. *Thigpen v. Reddix*, 105 S. Ct. 397 (1984).

## II

## THE DECISION BELOW WAS A SIMPLE APPLICATION OF THIS COURT'S DECISION IN *ENMUND*

### A. *Enmund* Prohibits The Imposition Of The Death Penalty On An Individual Without A Finding That He Killed, Attempted To Kill, Intended To Kill, Or Contemplated That Lethal Force Would Be Used.

On the ground that "punishment must be tailored to . . . personal responsibility and moral guilt," this Court held in *Enmund* that the Eighth and Fourteenth Amendments prohibit the execution of an individual who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used. 458 U.S. at 801. In reaching this result, the Court noted that legislatures have regularly rejected the imposition of the death penalty on such defendants. *Id.* Specifically, the Court concluded that only nine states allowed the imposition of the death penalty on defendants with Enmund's level of culpability. One of those nine was Mississippi; foreshadowing this case, the Court singled out the statute under which respondent was sentenced as authorizing an unconstitutional death sentence. *Id.* at 789 n. 5.

### B. Under The Mississippi Statutory Scheme, And As A Matter Of Due Process, The *Enmund* Findings Must Be Made By The Jury.

Both Mississippi state law and constitutional due process require that the *Enmund* findings be made by the jury before the death penalty can constitutionally be imposed.

**1. Mississippi Law Requires That The *Enmund* Findings Be Made By The Jury.**

The Mississippi statutes under which respondent was tried and sentenced required the jury to make all findings at both the guilt and sentencing phases in capital cases. *See* former Miss. Code Ann. § 99-19-101; Miss. Code Ann. § 99-19-103 (3a; 9a). Those statutes, however, did not require the jury to make any of the *Enmund* findings before imposing the death penalty. The 1983 amendments to the Mississippi capital sentencing statute corrected this defect by adding a section requiring the jury to make one of the *Enmund* findings before imposing the death penalty:

> (7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
>
> (b) The defendant attempted to kill;
>
> (c) The defendant intended that a killing take place;
>
> (d) The defendant contemplated that lethal force would be employed.

Miss. Code Ann. § 99-19-101(7) (1983) (9a).

Mississippi law required that all findings in capital cases — including the *Enmund* findings — be made by the jury. Respondent's death sentence was properly vacated because the jury did not make such findings.

**2. Due Process Requires That The *Enmund* Findings Be Made By The Jury.**

Due process also requires that the *Enmund* findings be made by the jury. An essential component of the right to trial by jury is the requirement that a criminal defendant be convicted only on a finding by the jury that he is guilty beyond a reasonable doubt of all elements of the crime with which he is charged. *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The requirement that all elements of a crime must be found by a jury flows from the "fundamental" role of trial by jury in the American system of criminal justice. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

> The guarantees of jury trial in the Federal and State Consitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the State.

*Id.* at 155-56. *See also Lee v. Madigan*, 358 U.S. 228, 237 (1959). It is for this reason that "[i]n a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt." *United States v. Spock*, 416 F.2d 165, 180-81 (1st Cir. 1969) (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)).

As a matter of due process, all of the elements of a crime must be found by the jury. The *Enmund* elements, as consitutionally-required prerequisites of a death sentence, are equivalent to elements of the crime, and must also be found by the jury.[8]

### C. Respondent's Death Sentence Was Properly Vacated Because The Jury Was Not Required To Make The *Enmund* Findings.

As the Fifth Circuit found (A12-A13), the jury instructions given at respondent's trial did not comport with the requirements of *Enmund*.

---

[8] The *Enmund* elements are critically different from statutory aggravating and mitigating circumstances, which may be found by a judge or a jury. Although a state may call a crime capital murder without requiring any of the *Enmund* findings, it cannot impose a death sentence without such findings. In contrast, no particular aggravating circumstances must be present to allow the imposition of the death sentence, and there are no mitigating factors whose presence precludes it.

(a) *Actually Killing*: The jury instructions did not require a finding that respondent actually killed. Instruction 15 only required the jury to find that Dickson was killed in the course of a robbery, whether by respondent or by "another." (TR-1418). Although Instruction 16 spoke of a finding that respondent "did in fact kill" (TR-1420), the jury was never told that the contrary statement — that respondent could be sentenced to death even if Tucker killed Dickson — was wrong. The likelihood that a juror concluded that respondent could be sentenced to death regardless of whether he personally killed Dickson was increased by the statement by the prosecuting attorney during closing arguments that "[w]e do not have to prove that he [respondent] killed this man. . . ." (TR-1310).

In any event, it is undisputed that it was Tucker — not respondent — who killed Dickson.

(b) *Attempting to Kill*: The jury instructions contained no language whatsoever requiring a finding that respondent attempted to kill.

(c) *Intent to Kill*: The jury instructions did not require a finding that respondent intended to kill. Instruction 15 stated that the jury could find respondent guilty of capital murder if the robbery was committed "with or without any design to effect the death of the said Mark Dickson." (TR-1418). Instruction 16 allowed a conviction even if the killing was done "without malice." (TR-1420). Although Instruction 15 also contained language about respondent's "consenting to the killing of the said, Mark Dickson" (TR-1418), the jury was never told that the repeated statements that it did not need to find intent to kill in order to sentence respondent to death were wrong.

(d) *Contemplation that Lethal Force Would be Used*: The jury instructions contained no language whatsoever requiring a finding that respondent contemplated that lethal force would be used.

As a matter of both Mississippi state law and due process, the *Enmund* findings must be made by the jury. Since the jury that sentenced petitioner to death was not required to make the necessary findings, his sentence was properly vacated.

## CONCLUSION

This case is of no importance beyond the immediate parties. The Fifth Circuit correctly applied a controlling decision of this Court to one of the statutes identified in that decision as constitutionally infirm. Indeed, the State later amended the statute in light of the constitutional requirements articulated by this Court.

Accordingly, the petition should be denied.

Dated: New York, New York
April 2, 1985

Respectfully submitted,

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# APPENDIX

## CONSTITUTIONAL AND STATUTORY MATERIALS

### U.S. CONST. AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### U.S. CONST. AMEND. XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

### MISS. CODE ANN. § 97-3-19 (*since amended*)

§ 97-3-19. HOMICIDE; MURDER DEFINED; CAPITAL MURDER.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriffs of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

MISS. CODE ANN. § 99-19-101 (*since amended*)

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstance shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commis-

sion of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstance shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

MISS. CODE ANN. § 99-19-101 (*as amended in 1983*)*

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

*(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;*

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

---

* Language added by 1983 amendment is italicized.

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

*(a) That sufficient factors exist as enumerated in subsection (7) of this section;*

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstance shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstance shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

*(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:*

*(a) The defendant actually killed;*

*(b) The defendant attempted to kill;*

*(c) The defendant intended that a killing take place;*

*(d) The defendant contemplated that lethal force would be employed.*

MISS. CODE ANN. § 99-19-103

§ 99-19-103. INSTRUCTIONS; AGGRAVATING CIRCUMSTANCES SHALL BE DESIGNATED BY JURY IN WRITING; EFFECT OF JURY'S FAILURE TO AGREE ON PUNISHMENT.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such

aggravating circumstances is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

## CERTIFICATE OF SERVICE

I, Joseph T. McLaughlin, counsel of record for respondent, certify that I have this day caused to be mailed via the United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to the following:

William S. Boyd, III
Special Assistant Attorney General
Counsel of Record for Petitioners
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This, the 2nd day of April, 1985.

/s/ JOSEPH T. MCLAUGHLIN
Joseph T. McLaughlin

Office-Supreme Court, U.S.
FILED
JUL 8 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1236

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DONALD A. CABANA, SUPERINTENDENT, ET AL.,
Petitioners

vs.

CRAWFORD BULLOCK, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

# JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
JANUARY 29, 1985
CERTIORARI GRANTED APRIL 22, 1985

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130 pp

APPENDIX

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* * *

MOTION TO QUASH INDICTMENT
AND
DECLARE STATUTE UNCONSTITUTIONAL

Comes now the Defendant, Crawford Bullock, Jr., by and through his attorneys and moves the Court to Quash the Indictment returned against Defendant by the Hinds County Grand Jury.

As grounds therefor [sic] Defendant separately and severally states the following:

1.

The statute upon which the indictment is based "Section 97-3-19(2)(e) of the Mississippi Code of 1972, Annotated," (sic) does not "specifically cite a capital

offense "in the indictment returned against the accused by setting forth the section and subsection number of the Code defining the offense alleged to have been committed by the accused."[sic] as required by Miss. Code Ann. Section 99-17-20 (Cum. Supp. 1977), in that

a) The indictment charges, inter alia, a "violation of Section 97-3-19(2)(e) of the Mississippi Code of 1972, Annotated," (sic) when, in fact Miss. Code Ann. Section 97-3-19 (1972) only contains Sub-Sections (a), (b), and (c), and does not contain any subsection "(2)(e)" as stated in the indictment;

b) If, on the other hand, the indictment intended to charge a violation of Section 97-3-19(2)(e) of the Mississippi Code of 1972, as amended and currently codified as Miss. Code Ann. Section

97-3-19(2)(e) (Cum. Supp. 1977) it did not do so

[TR 69] 18

with the specificity required in capital cases by Miss. Code Ann. Section 99-17-20 (Cum. Supp. 1977), thus also violating Defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States of America and Section 26, Mississippi Constrituion (1890).

c) The indictment fails to set forth "the section and subsection number of the Code defining the offense (of robbery) alleged to have been committed by the accused," an essential element of the capital crime charged, all in violation of the Defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States of

[TR 70]

America and Section 26, Mississippi Constitution (1890). The indictment's failure in this additional regard is fatally defective in and of itself, particularly in light of the fact that there are several different criminal robbery states in the Mississippi Code.

2.

The statute on which the indictment is based, Miss. Code Ann. Section 97-3-19(2)(e) (Cum. Supp. 1977) is unconstitutional and violative on its face and, particularly as applied in this case, of the Eighth and Fourteenth Amendments to the Constitution of the United States of America in that:

a) The statute inflicts the cruel and unusual punishment of death which is excessive and disporportionate to the offense charge;

[TR 70]

b) The statute inflicts the cruel and unusual punishment of death, as applied, for the unintentional killing of a human being without deliberate design to effect the death of a human being whereas another criminal statute, Miss. Code Ann. Section 97-3-19(1)(a); inflicts a lesser maximum punishment of life imprisonment for the intentional killing of a human being with design to effect the death of the person killed and other criminal statutes, Miss. Code Ann. Section

[TR 70]

97-3-19(b) and (c) inflict a lesser maximum punishment of life imprisonment for virtually the same unintentional killing charged in the instant indictment, all in violation of Equal Protection of the Laws and of the Eighth and Fourteenth Amendments to the United States Constitution, and

[TR 71]

Section 14 of the Mississippi Constitution (1890), and the death penalty is not a deterrant generally or to the acts charged in the indictment;

c) The statute on its face and as applied results in the arbitrary and discriminatory application of the death penalty including, but not limited to, its application, in virtually every case, only when the victim or victims are white and not when the victim or victims are black;

d) The death penalty punishment statutes, Miss. Code Ann. Section 99-19-101 (Cum. Supp. 1977), which must be read in pari materia with the statute of the indictment, Miss. Code Ann. Section 97-3-19(2)(e) (Cum. Supp. 1977), are unconstitutional and violative of the Eighth and Fourteenth Amendments to the United States Constitution in that:

(i) the aggravating circumstances listed are arbitrary and capricious, deny due process and equal protection, are overbroad and vague, are unrelated directly to the capital crime charged and outnumbered the statutorily limited mitigating circumstances, Miss. Code Ann. 99-19-101(5)(a), for example, is vague and unconstitutionally, aribtrarily, and discriminatorily creates an irrebuttable presumption, and denies due process and equal protection of the laws to persons who have been released from incarceration pursuant to authorization of state law but who still technically remain under "a sentence of imprisonment." Subsection (5)(b) suffers the same infirmities. Subsection (5)(h), for

[TR 71]

another example, is overbroad, vague, and necessarily requires arbitrary and capricious application by requiring and

[TR 71]

encouraging subjective value judgments ("heinous," "atrocious," "cruel") without objectively defining or limiting the unconstitutionally unfettered and prejudicial discretion which this subsection grants on its face and as applied.

(ii) The "mitigating circumstances" Subsections Miss. Code Ann. Section 99-19-101(6) (Cum. Supp. 1977) are arbitrarily, capriciously, and, compared to the aggravating circumstances subsection, unequally limited, deny defendants due process and the equal protection of the law,

[TR 72]

and (especially when considered in conjunction with the "aggravating factors" subsection) unconstitutionally shift a fundamentally unfair burden of proof to the Defendant. For example, Subsection (5)(h) ("aggravating") ostensibly allows consideation of various aggravating factors of the actual capital offense in qustion whereas the "mitigating circumstances" Subsection prohibits presentation of counterpart "mitigating circumstances" of the actual capital offense in question.

(iii) The punishment statutes, supra, unconstitutionally fail to allow under any circumstances whatsoever the trial judge either to enter a sentence of life imprisonment

[TR 72]

nothwithstanding a jury's unanimous recommendation of death, or to direct a punishment of life imprisonment without submission of the punishment issue to the jury, all in violation of the Eighth and Fourteenth Amendments to the United States Constitution and of Section 14, Mississippi Constitution (1890).

(iv) Miss. Code Ann. Section 99-19-105 (Cum. Supp. 1977), providing for sentence review by the Supreme Court, is arbitrary and capricious, overbroad and vague, denies due process and equal protection of

[TR 72]

the laws, and is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the

[TR 73]

United States of America.

THEREFORE, Defendant respectfully moves the Court to Quash the Indictment and to declare the Statutes attacked, supra, unconstitutional on their face and/or as applied.

Respectfully submitted,

CRAWFORD BULLOCK, JR.

BY: /s/ Don H. Evans
DON H. EVANS
Attorney for Defendant

* * *

* * *

BY THE COURT:

We'll start on State's 2.

BY MR. EVANS:

Number 2 is the State's murder instruction. Is that right?

BY THE COURT:

Yes, sir.

BY MR. EVANS:

All right, to that we are going to object. We object to it first on the grounds that the indictment does not allege regular murder and therefore the defendant cannot be faced with the possible conviction of regular murder.

Number 2, the murder statute, Section 97-3-19 under Section 1 has three sections of situations whereby a person

can be convicted of murder. They are listed as A, B and C. The indictment does not contain allegations that would fit any one of the situations.

Number 3, capital murder is the only murder conviction which the indictment would support and the elements of robbery is not alleged and the indictment would not support this.

Number 4, the instruction does not properly instruct the jury on the elements of murder in that it defines murder under Section 97-3-19A which is the killing of another human being with malice aforethought; however, when it instructs the jury as to what they must believe beyond a reasonable doubt, it leaves out the malice aforethought and other essential elements to the indictment for murder with malice aforethought. Furthermore, it is not a

proper manslaughter instruction in that it eliminates killings that are wrongful or by accident or just killing that justify or otherwise are not unlawful. Because of the aforesaid, the instruction is confusing, it's misleading and is not a true statement of the law.

Number 5, the instruction does not take into account the Weathersby rule whereby the defendant is the only witness.

Number 6, the instruction does not properly instruct the jury as to the burden of proof required by the State and it does not account for the burden required by the State under a circumstantial evidence case and does not require the State to prove the case to the exclusion of every other reasonable hypothesis other than consistent with innocence. The instruction requires the defendant to be found guilty of murder

less than capital which I have never seen stated in this manner before and I don't believe there is any such possible

[TR 1234]

verdict that could be returned and it basically just does not state the law and I would like to do considerable argument on this.

BY THE COURT:

Well, I just need you to state your objections is all I need, Mr. Evans, and I think your main objection, other than the fact that it does not require finding malice aforethought, is that you do not consider murder less than capital murder as being a lesser included offense of capital murder. Is that correct?

BY MR. EVANS:

Your Honor, my position is this.

[TR 1235]

BY THE COURT:

You do not need to restate them all.

BY MR. EVANS:

I am not going to restate them all. Since this is a capital murder case and I am an appointed attorney and we put all these hours into this case getting ready for trial and put all of these days into the trial, I know that this instruction cannot be given on murder. I can show it. It's based on indictments. You have to indict somebody for murder in order to instruct them for murder. I can show it. We have -- everybody knows that murder is a lesser included offense than capital murder if you have a sufficient indictment. The sufficient indictment for murder to be a lesser included offense, capital murder would be that you allege malice aforethought in your indictment. Now, I can show you

cases where they have argued the same point as to whether the indictment is sufficient in recent cases where they could have been found guilty in a

[TR 1235]

violence case of murder and it's got -- (pause).

BY MR. PETERS:

While he is reading that, Your Honor, I would like to amend September the 21st to September the 22nd and, after human being --

BY THE COURT:

(Interposing) Make your own amendments.

BY MR. EVANS:

All right. In the case of --

BY THE COURT:

(Interposing) Mr. Evans, I can read better than I can listen. Let me just read the case.

[TR 1236]

BY MR. EVANS:

I can explain it to you. If you will notice at the bottom of that case, it gives a footnote of the indictment and will show you what kind of indictment that was.

BY THE COURT:

Go ahead.

BY MR. EVANS:

All you have got to do to know that I am right is to think of a murder case. The only time a person can be convicted ofmurder is based upon the indictment. He can't be brought in here charged with a manslaughter and it says a manslaughter indictment -- it says that he unlawfully and feloniously had killed someone and slayed someone and you know that he cannot be found guilty of murder on that charge if that's all you brought him in here on. All right. Then you take a murder indictment, any murder

[TR 1236]

indictment they file here, that would have malice aforethought -- did kill and murder with malice

[TR 1236]

aforethought. By this being a capital murder offense, that is a killing and a robbery. If the jury gets in here and decides that there is not sufficient evidence to prove a robery, then you only could do one thing. You can fall back -- your indictment you can fall back on is your murder indictment and they can find him guilty of murder if you have charged him with murder. They charged him with manslaughter -- not murder. Their indictment -- you can look at it -- is in no way a murder indictment which is legal. Under capital murder, you can go that way. You don't have to go with the murder only and there is absolutely no way that a murder

[TR 1237]

BY MR. EVANS:

Your Honor, I know this is -- I don't know what to say at this point. I know that it's obvious that you cannot give that instruction and we have worked this long at it and this

[TR 1237]

hard at it and we have been appointed and I will make $500.00 at the most and I feel that I should be -- that the Court should take additional time to find out if that instruction should be given or not.

BY THE COURT:

Well, I think that's what I have done, Mr. Evans.

BY MR. EVANS:

Yes, sir, Your Honor, that's true. You have checked it there that few minutes but there is no way that you can come up with a basis for giving that instruction.

[TR 1238]

BY THE COURT:

Well, I consider the basis of at least one year up here, Mr. Evans.

BY MR. EVANS:

Of what now?

BY THE COURT:

I consider that the fact that I have been up here for one year a basis for me ruling on the instructions. Now, if you have some more argument, let's present it.

BY MR. EVANS:

Well, let me see if I understand it right. You are saying that, if the jury found the defendant did not commit the robbery, that they could find him guilty of murder -- under the malice aforethough murder under this indictment. Is that right?

BY THE COURT:

Yes, sir. Isn't that what the Biles case states, Mr. Evans?

[TR 1238]

BY MR. EVANS:

No, sir, the Biles case doesn't state that.

BY THE COURT:

What about the Rogers case?

BY MR. EVANS:

I am not sure.

BY MR. PETERS:

The Jackson case, Your Honor.

BY MR. EVANS:

Your Honor, you cannot show me any law -- neither one of you can show me any law that says that this indictment can support a murder conviction. It's a lesser included offense on a properly instructed case -- a properly indicted case, Your Honor.

BY THE COURT:

Okay. If the instruction can be amended to properly include all of the elements of the charge of murder less than capital, it will be given.

[TR 1239]

BY MR. EVANS:

But, Your Honor, he cannot. You cannot charge -- you cannot instruct to something th. 's not in the indictment. He has never been charged with malice aforethough in this indictment so how are we going to let him do an instruction on malice aforethought? How can I prepare a defense to this indictment? This indictment obviously won't support a murder conviction and I just can't see any basis for how the Court can reach this decision at this time knowing that the case would have to be retried. You know, we have been up here all this time and I think it's obvious here and I have gone through all this work

[TR 1239]

and I hate to see it be brushed by at this time when I know that it will be reversed.

[TR 1240]

BY THE COURT:

Well, I will not brush it aside, Mr. Evans. I want to hear from you.

BY MR. EVANS:

All right. My argument then is the same -- that there is no indictment here that will support a murder conviction. He has not charged in his indictment malice aforethough in the indictment. In a murder indictment that would support a malice aforethought murder conviction would have to contain it in the indictment. It's just like the case I reversed up there at the Supreme Court, and you are familiar with it. If that little difference would reverse a case like that -- the indictment is one of the most important things that you can have. The indictment is what a man is charged with -- he faces his livelihood on it where he may go to the pen for the rest of his life.

[TR 1240]

If the indictment does not say what he is charged with, he has a right to rely on what this indictment charges. This indictment says that he has a manslaughter-robbery and, if he cannot rely on that -- if he's just gonna come in here at a later date -- if the State can do this, then it is obvious that the State -- all you've got to do is see that is cannot be done. If at any time the State wanted to get a murder case when all they've got is a manslaughter case -- when they know somebody has killed somebody out here and they know they don't have enough evidence to prove malice aforethought, they know they can't prove that, well all they gave to do in order to get their murder conviction is to charge them with having

[TR ' '0]

tried robbing that guy, knowing that they

[TR 1241]

can't offer one ism of testimony to back that. The jury will go back there and say: "No, there wasn't any robbery", then they can throw the murder -- then they will say: "We won't do it on capital murder. We'll just do a lesser offense", and that would obviously -- it would be the easiest thing in the world for the District Attorney to do at the time in order to convict someone of murder when they couldn't do it on manslaughter. They would always charge him with capital murder. That's one clear example that would show to you that this instruction cannot be given. The State's instruction for murder in this indictment cannot be -- it's just not legal. It cannot be given on this because of the reasons that I stated and the reason I am arguing so hard here is that we have gone so far and I know I am right and I just hate to see me get

shot down here. I know the District Attorney wants to win the case but I think the reason I am explaining so hard is I think maybe you haven't seen what I am talking about and I believe if you really look into it and study that aspect you will see that I am right. I know that I can sit here and wait for a reversal but I am appointed, nobody has got any money involved in this case, and to go all the way to the Supreme Court and then they come back and convict him of murder, then I've really got to go through all of that and I am still appointed. Now, this is a long trial and I think that it would be an absolute waste of all of what we have gone through to allow an instruction to go in here that I know just cannot stand. Certainly the District Attorney is going to argue that it can but he can't back it. He can't show you one

case. All he can show you is that murder

[TR 1241]

is a lesser included offense than capital murder and I don't think anybody disputes that. We know that. It's what the indictment says. If you are charged, just like in that case, of willful and malice aforethought, did kill and murder so and so while in the commission of kidnapping or while in the commission of robbery, he could have done it. That was his fault. That was his error and I shouldn't have to suffer his mixup.

BY THE COURT:

Do you have a copy of the indictment in the Jackson case? Is it referred to anywhere in the opinion?

BY MR. PETERS:

I am not sure, Your Honor.

[TR 1242]

BY MR. EVANS:

Your Honor, I would like to ask that we get it. We can probably come up with it.

BY MR. PETERS:

I've got the decision.

BY THE COURT:

Well, let's see if it mentioned the indictment.

(Off the record)

BY THE COURT:

I apologize. I see your point.

BY MR. PETERS:

It doesn't say what the indictment alleges that I can find; however, this is what the Court said so that we can all hear it and won't have to all read it. Under paragraph D under 13 -- may the jury in a death penalty case be instructed as to the possibility of their finding the accused guilty of a lesser

[TR 1242]

included offense? Directly related to the constitutional issues involved in this case is the question of whether the Court can instruct the jury as to their right to convict an accused of a lesser included offense of a capital crime when such conviction is warranted by the evidence -- that's all it says -- warranted by the evidence. Such an instruction when warranted by the evidence is desirable in order to facilitate the orderly and efficient administration of justice so as many issues as practical can be disposed of in the trial of a given case. Prohibiting the Court to instruct as to the lesser included offense could result in needless retrials should the jury be unable to agree on its verdict with regard to the capital offense charged. The already overburdened judicial system cannot aford such a waste of

time and energies. Such a procedures not only constitutes an impediment to a full, complete and efficient administration of justice but it creates additional financial and emotional hardship upon the accused persor and his family by delaying the final determination of his case.

BY THE COURT:

That still doesn't answer the question of where there is a failure to allege that the killing was with malice aforethought.

BY MR. PETERS:

The only thing that I can offer in the alternative is, as you know, the indictment for a capital case is with or without intent to kill. If you allege in the indictment that they committed the robbery with or without the intent to kill, then you are putting him in an alternative

[TR 1243]

indicted position. That

[TR 1243]

is, you are increasing your degree of proof on capital murder if you say he killed him with intent whereas you dont' have to prove that. All you have to prove is that he killed him without intent, then you are prohibited of ever finding him guilty of murder and I suggest that the Supreme Court would never put any Grand Jury or District Attorney in that position. That would truly be an impediment to justice and the third position is that, if you indict someone for capital murder and they find him not guilty of capital murder, then the jury is thrown into the position of -- "Well, all we've got left is manslaughter" and so they find him guilty of manslaughter and the person actually is guilty of murder and that certainly wouldn't be justice, so in my

[TR 1244]

opinion, in reading the Jackson case, the only way you can have a judicial determination of capital murder with a lesser degree of proof is to indict without malice -- without intent -- to let the jury then determine whether or not there was or was not intent for a lesser included offense based on the evidence that they say in the Jackson case and then, if they find that there was not intent, then they can find him guilty of manslaughter. All three issues are then determined at that one trial based on the evidence as stated in the Jackson case.

BY THE COURT:

Anything else, Mr. Davis?

BY MR. DAVIS:

No, Your Honor.

BY MR. PETERS:

I will say this, I would be perfectly willing to give

[TR 1244]

This jury the alternative of finding this man guilty of manslaughter or capital murder because I think there is no doubt that he can be convicted of capital murder. If that's the position the defendant wants and if that's what he's moving for and will not raise it on appeal that the Court didn't give a lesser included offense instruction, I am perfectly willing to give them the alternative. Do you want to give him a simple manslaughter or do you want to give him murder or do you want to turn him loose?

BY MR. EVANS:

Your Honor, I think we have to go by what the indictment says. I don't have any alternative but I could not stipulate to that.

BY THE COURT:

You don't think a manslaughter charge is stated in the indictment?

[TR 1245]

BY MR. EVANS:

I think manslaughter is a lesser included offense in this indictment and so it can be given. A manslaughter instruction can be given on this indictment.

BY MR. PETERS:

Your Honor, --

BY THE COURT:

Just a minute, Mr. Peters. Are you asking -- I am asking do you have an instruction -- do you have an objection to State's instruction number 5?

BY MR. EVANS:

Let me look.

[TR 1245]

(Off the record)

BY THE COURT:

It's a manslaughter instruction.

BY MR. EVANS:

I don't have any objection to the manslaughter instruction at the time.

[TR 1246]

BY THE COURT:

What?

BY MR. EVANS:

I have no objection to the manslaughter instruction, Your Honor.

BY THE COURT:

State's instruction number 2 will be refused.

BY MR. PETERS:

And is it your position, Your Honor, -- I take it that it's the defendant's position that no instruction on murder can be given by the Court at this time.

BY THE COURT:

That's right.

BY MR. EVANS:

That's my position.

[TR 1246]

* * *

INSTRUCTION NO. D-12

The Court instructs the Jury that circumstantial evidence has been received in every age of common law, and may arise so high in the scale of belief as to generate full and complete conviction beyond a reasonable doubt of the Defendant's guilt, providing it excludes every other reasonable hypothesis other than that of guilt; and if the Jury does not believe that in this case it does arise so high in the scale of belief as to generate full and complete conviction of Defendant's guilt beyond a reasonable doubt and that it does not exclude every other reasonable hypothesis than that of the guilt of the Defendant in the minds of the Jury, then you are not authorized to act upon it and are required under the law to find the Defendant "Not Guilty."

Refused

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1386]

* * *

INSTRUCTION NO. D-10

The Court instructs the Jury that if the evidence in the case leaves it indifferent which of several hypothesis arising and growing out of the evidence in the case is true, or merely establishes some finite probability in favor of the hypothesis of guilt, rather than another, such evidence cannot amount to legal proof of guilt, however great the probability may be.

Refused

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By: B.D. D.C.

[TR 1387]

* * *

INSTRUCTION NO. D-18

The Court instructs the Jury that you are required under the law to accept the Defendant's version of the facts regarding this case as true, if his version is reasonable, and if it has not been substantially contradicted in material particulars by a credible witness or witnesses for the State, or by the physical facts or by the facts of common knowledge.

Refused

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1388]

* * *

INSTRUCTION NO. D-19

The Court instructs the Jury that you are the sole judges of the facts in this case. Your exclusive province is to determine what weight and what creditability will be assigned the testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound judgment in considering and weighing the testimony of each witness who has testified in this case.

The Court further instructs you that you may consider the statement given by Crawford Bullock, Jr. in the light of the

[TR 1389]

manner by which you found it was obtained and give it such weight and creditability as you think it is entitled. Unless you believe from the evidence beyond a reasonable doubt that the statement made by the Defendant, was truthful, was accurately repeated or recorded, the Defendant understood what was said, and that such statement was made by the Defendant of his own free will and was not coerced, extorted, or induced by threat of harm or proimise of benefit, you must disregard the statement to the extent that these facts tend to discredit it.

Refused

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B.D. D. C.

[TR 1389]

* * *

JURY INSTRUCTION NO. S-2

The Court instructs the Jury that murder is the killing of a human being with malice, aforethough and without the authority of law, by any means or by any manner, when done with the premeditated and deliberate design to effect the death of the person killed. The Court further instructs you that if you believe from the evidence in this case, beyond a reasonable doubt, that Crawford Bullock, Jr., on or about September 22, 1978, in the First Judicial District of Hinds County, Mississippi killed Mark Dickson, a human being, as stated above, and not in necessary self defense, then he is guilty of murder, and it is your sworn duty

[TR 1390]

to so find; and in that event, the form of your verdict shall be:

"We, the Jury, find the defendant guilty or murder less than capital."

Your verdict shall be written on a separate sheet of paper.

Refused

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1390]

* * *

INSTRUCTION NO. D 1

The Court instructs the Jury to find the Defendant "Not Guilty."

Refused
W.F.C.
Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By Barbara Dunn, D.C.

[TR 1391]

* * *

INSTRUCTION NO. D--8

The Court instructs the Jury that it is the duty of each member of the Jury to make up his verdict separately as to the guilt or innocence of the Defendant, and, unless each individual member of the Jury is satisfied, beyond all reasonable doubt, such Jurors ought not to find the Defendant guilty. In otherwords, as long as any single Juror on the panel entertains a reasonable doubt as to the guilt of the Defendant, after a fair and honest conference with his fellow Jurors, it is the duty of such Juror on his oath to vote "Not Guilty" and never yield his convictions simply because every other man on the Jury

[TR 1392] D-8

may differ with him, for each Juror is along responsible to his own conscience in making up his verdict.

Refused

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1392]

* * *

INSTRUCTION NO. D-9

The Court instructs the Jury that he is a competent witness in his own behalf, and it is the duty of the Jury to consider his testimony, just as it does the testimony of any other witness in this case; and, if from his testimony in connection with the testimony of others, or his testimony alone, there arises a reasonable doubt of his guilt, then he is, in the eyes of the law, innocent of the crime charged and the Jury shall find him "Not Guilty."

Refused
Filed May 18, 1979
Wm. E. "Bill" McKinely
Circuit Clerk
By B. D. D.C.

[TR 1393] D-9

* * *

INSTRUCTION NO. D-31

The Court instructs the Jury that there is nothing which would suggest that the decision to afford an individual defendant mercy violates the Constitution.

Refused
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1394]

* * *

INSTRUCTION NO. D-30

The Court instructs the Jury that you need not find any mitigating circumstances in order to return a sentence of life imprisonment. A life sentence may be returned regardless of the evidence.

Refused
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1395]

* * *

INSTRUCTION NO. D--33

The Court instructs the Jury that in your deliberations on the question of punishment, you are to presume that if you sentence the Defendant to life imprisonment, that the Defendant will spend the rest of his life in prison, and you are to presume that if you sentence the Defendant to death that he will receive a lethal gas until he is dead. You are to make no other presumptions.

Refused

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1396]

* * *

INSTRUCTION NO. D-35

The Court instructs the Jury that in the absence of a conspiracy by Crawford Bullock, Jr. to commit or attempt to commit the crime of robbery of Mark Dickson, the mere presence of Crawford Bullock, Jr. is not sufficient to convict him of robbery even though you may believe that Crawford Bullock, Jr. may have approved of the robbery.

And the Court further instructs the Jury that in the absence of a conspiracy by Crawford Bullock, Jr. to commit or attempt to commit a homicide of Mark Dickson, the mere presence of Crawford Bullock, Jr. is not sufficient to convict him of the

[TR 1397]

homicide of Mark Dickson even though he may have approved of the homicide.

Refused

Filed May 21, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By Peggy Wilson, D.C.

[TR 1397]

* * *

INSTRUCTION NO. D-36

The Court instructs the Jury that in the absence of a conspiracy by Crawford Bullock, Jr. to commit or attempt to commit the crime of robbery of Mark Dickson, the mere presence of Crawford Bullock, Jr. is not sufficient to convict him of robbery even though you may believe that Crawford Bullock, Jr. may have approved of the robbery.

Therefore, the Court instructs you that in order for you to find Crawford Bullock, Jr. guilty of robbery, the State must prove to you beyond a reasonable doubt each of the following essential elements:

[TR 1398]

1. That Crawford Bullock, Jr. had a feloniously intent to rob and take away the personal property of Mark Dickson prior to Mark Dickson's death or that he aided and abetted Rickey Tucker who had a feloniously intent to rob and take away the personal property of Mark Dickson prior to Mark Dickson's death and that Crawford Bullock, Jr. was aware of Rickey Tucker's feloniously intent to rob and take away the personal property of Mark Dickson prior to Mark Dickson's death.

2. That Crawford Bullock, Jr. did in fact use force or put Mark Dickson in fear of some immediate injury to his person as a means of obtaining the personal property of Mark Dickson or that Crawford Bullock, Jr. aided and abetted Rickey Tucker in using force or in putting Mark Dickson in fear of

[TR 1398]

some immediate injury to his person as a means of obtaining the personal property of Mark Dickson and that Crawford Bullock,

[TR 1398]

Jr. knew at the time he aided or abetted Rickey Tucker, that Rickey Tucker was using force or putting Mark Dickson in fear of some imediate injury to his person as a means of obtaining the personal property of Mark Dickson.

3. That by Crawford Bullock, Jr. using the force or putting Mark Dickson in fear, Crawford Bullock, Jr. was able to take and carry away the personal property of Mark Dickson from his person or his presence and against his will, or that by Rickey Tucker using the force or putting Mark Dickson in fear Rickey Tucker was able to take and carry away the personal property of Mark Dickson from his person or his presence and

[TR 1399]

against his will and that Crawford Bullock, Jr. aided or abetted Rickey Tucker in doing so well knowing that Rickey Tucker had the intention of robbing Mark Dickson.

The Court instructs you that if the State fails to convince you beyond a reasonable doubt from the evidence any one of the three essential elements, then Crawford Bullock, Jr. is not guilty of robbery.

Refused

Filed May 21, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By Peggy Wilson D. C.

* * *

INSTRUCTION NO. D-37

The Court instructs the Jury that in the absence of a conspiracy by Crawford Bullock, Jr. to commit or attempt to commit a homicide of Mark Dickson, the mere presence of Crawford Bullock, Jr. is not sufficient to convict him of the homicide of Mark Dickson even though he may have approved of the homicide. Therefore, the Court instructs you that in order for you to find Crawford Bullock, Jr. guilty of manslaughter, the State must provide to you beyond a reasonable doubt each of the following essential elements:

1. That Crawford Bullock, Jr. did in fact kill Mark Dickson or that he knowingly

[TR 1400]

aided and abetted Rickey Tucker in the killing of Mark Dickson.

2. That such killing or slaying was unlawful and felonious.

3. That neither Crawford Bullock, Jr. nor Rickey Tucker killed Mark Dickson in self defense.

4. That either Crawford Bullock, Jr. or Rickey Tucker did not kill Mark Dickson at a time when they, Crawford Bullock, Jr. and Rickey Tucker, were not the aggressor nor the provoker, and were faced with a sudden combat, without undue advantage being taken, and without any dangerous weapon being used and not done in a cruel or unusual manner.

The Court further instructs you that if the State fails to prove to you any one of the above, beyond a reasonable doubt,

[TR 1400]

then it is your sworn duty to find the Defendant "Not Guilty of Manslaughter."

Refused

Filed May 21, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By Peggy Wilson D. C.

[TR 1400]

* * *

INSTRUCTION NO. D-34

The Court instructs the Jury that the State must prove to you beyond a reasonable doubt that Crawford Bullock, Jr. had the feloniously intent to rob or take away the personal property of Mark Dickson against his will by violence to his person or by putting him in fear of some immediate injury to his person prior to Mark Dickson's death or he is not guilty of robbery and you must find him not guilty of capital murder.

Refused

Filed May 21, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By Peggy Wilson D.C.

[TR 1401]

* * *

JURY INSTRUCTION NO. 1

Members of the jury, you have heard all of the testimony and received the evidence and will shortly hear arguments of counsel. The court will presently instruct you as to the rules of law which you will use and apply to this evidence in reaching your verdict. When you took your places in the jury box, you made an oath that you would follow and apply these rules of law to the evidence in reaching your verdict in this case. it is, therefore, your duty as jurors to follow the law which I shall now state to you. <u>You are not to be concerned with the wisdom of any rule of law</u>. Regardless of any opinion you may have as to

[TR 1402]

what law ought to be, it would be a violation of your sworn duty to base your verdict upon any other view of the law than that given in these instructions by the court.

It is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an aribtrary power but must be exercised with sincere judgment, sound discretion and in accordance with the rules of law stated to you by the court.

Both the State of Mississippi and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case.

It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to

[TR 1402]

apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork or conjecture.

[TR 1402]

You are required and expected to use your good common senses and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.

The evidence which you are to consider consists of the testimony and statements of the witnesses and the exhibits offered and received. You are also permitted to draw such reasonable inferences from the evidence as seems justified in the light of your own experience.

Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark.

The production of evidence in court is governed by rules of law. From time to time during the trial, it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourself with the reasons for the court's rulings since they are controlled and governed by rules of law. You should not infer from any rulings by the court on these motions or objections to the evidence that the court has any opinion on the merits favoring one side or another. You should not speculate

[TR 1403]

as to possible answers to questions which the court did not require to be answered. Further, you should not draw any inference from the content of these questions. You are to disregard all evidence which was excluded by the court from consideration during the course of the trial.

If in stating the law to you I repeat any rule, direction or idea, or if I state the same in varying ways, no emphasis is intended and you must not draw any inference therefrom. The order in which these instructions are given has no significance as to their relative importance.

Given

[TR 1403]

* * *

INSTRUCTION NO. 2

The Court instructs the Jury that the mere fact that this Defendant has been indicted creates no presumption of guilt against him, and the law presumes the Defendant in this case, notwithstanding the indictment, to be innocent until his guilt is proven beyond every reasonable doubt.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1404] D-4

* * *

INSTRUCTION NO. 3

The Court instructs the Jury that no person should be convicted upon his reputation, character, or former conviction, but must be convicted by the evidence in this case; and the evidence must exlcude any and every reasonable doubt.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1405] D-3

* * *

JURY INSTRUCTION NO. 4

The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State the burden of proving the Defendant guilty of every material element of the crime with which he is charged. Before you can return a verdict of guilty, the State must prove to your satisfaction beyond a reasonable doubt that the Defendant is guilty. The presumption of innocence attends the Defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the Jury of his guilt beyond a reasonable doubt. The Defendant is not required to prove his innocence.

Given

[TR 1406] C-2

* * *

INSTRUCTION NO. 5

The Court instructs the Jury that the law starts out with the presumption that the Defendant is entirely innocent of the crime charged against him, and every part and parcel of it; and that this presumption accompanies the Defendant throughout every step and stage of the trial, and is in itself sufficient to find the Defendant "Not Guilty" unless it has been broken down and overcome by competent and credible testimony, satisfying the minds and consciences of the Jury of the guilt of the Defendant, beyond every reasonable doubt. It is not sufficient for the Jury to believe that the Defendant is probably guilty, nor

[TR 1407]

will a mere preponderant testimony justify a conviction, but the Jury must be satified from the evidence, beyond a reasonable doubt, that the Defendant is guilty before you can convict.

Given

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1407] D-5

* * *

INSTRUCTION NO. 6

The Court charges the Jury that it is as much the sworn duty of the Jurors to acquit the innocent as it is to convict the guilty; and under the law of the State of Mississippi, all persons are presumed to be innocent until proven guilty so conclusively as to remove every reasonable doubt. Furthermore, the Court instructs you that the doctrine of "reasonable doubt" is just as much the law as any other constitutional or legal principle; and if, in the minds of the Jury such reasonable doubt of the Defendant's guilt exists in

[TR 1408]

this cause arising out of the evidence, the Court instructs and directs you to acquit the Defendant.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1408] D-7

* * *

INSTRUCTION NO. 7

The Court instructs the Jury that you are bound in deliberation upon this case to give the Defendant the benefit of every reasonable doubt of his guilt that arises out of the evidence or want of evidence in this case. There is always a reasonable doubt of his guilt when the evidence simply makes it probable that he is guilty. Mere probability of guilt, however strong, will never warrant you in convicting the Defendant. It is only when, on the whole evidence, you are able to say, on your oaths, beyond every reasonable doubt, that he is guilty that the law will permit you to find him guilty. You might be able to say

[TR 1409]

that you believe him guilty, and yet, if you are not able to say on your oaths, beyond every reasonable doubt, that he is guilty, it is your sworn duty by your verdict to say "Not Guilty."

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1409] D-6

* * *

INSTRUCTION NO. 8

The Court instructs the Jury that in passing upon the action of the accused the Jury should not try him by the light of after developed events, nor hold him to the same cool and correct judgement which you are able to form. You should put yourselves in his place, and judge of his act by the facts and circumstances by which he was surrounded.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B.D. D.C.

[TR 1410] D-16

* * *

INSTRUCTION NO. 9

The Court instructs the Jury that since the Defendant is the only eyewitness to the homicide which testified in this trial, you are required under the law to accept his version as true, if his version is reasonable, and if it has not been substantially contradicted in material particulars by a credible witnesses for the State, or by the physical facts or by the facts of common knowledge.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1411] D-21

* * *

INSTRUCTION NO. 10

The Court instructs the Jury that if there be any material facts or circumstances in this case susceptible of two reasonable interpretations, one favorable and the other unfavorable to the accused, and when the Jury has considreed such facts or circumstances with all the other evidence, there is a reasonable doubt as to the correct interpretation, you must resolve such doubt in favor of the accused and place upon such facts or circumstances the interpretation, favorable to the accused.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1412]

* * *

INSTRUCTION NO. 11

The Court instructs the Jury that if you believe from the evidence offered in this trial, that Crawford Bullock, Jr., at the time of the giving of his statement to the law enforcement officials, was suffering extreme pain and was experiencing a high fever and was in urgent need of medical treatment and that if you further believe that he was told or led to believe by the law enforcement officials that he could only receive medical treatment if he gave a written statement to the law enforcement officials and if you further believe that Crawford Bullock, Jr. gave the statement at

[TR 1413]

a time when he was not in the proper mental or physical state to properly read and study the contents of the statements so as to ascertain if it was accurately repeated or recorded, then you may consider the statement in the light of the manner by which you found it was obtained and give it such weight and creditability as you think it is entitled.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1413] D-20

* * *

INSTRUCTION NO. 12

The Court charges the Jury that under the law each and every Juror must agree upon a verdict as the verdict of the Jury. In otherwords, all twelve of the Jurors must agree upon the verdict in this case.

Given

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1414] D-14

* * *

JURY INSTRUCTION NO. 13

The verdict of the jury must represent the considered judgment of each juror. In order to return a verdict it will be necessary that each juror agree thereto. In other words, all twelve jurors must agree on a verdict in this case. It is your duty as jurors to consult with one another and to deliberate in view of reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your

[TR 1415]

opinion if convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Given

[TR 1415] C.3

* * *

INSTRUCTION NO. 14

The Court instructs the Jury that every person who shall feloniously take the personal property of another in his presence or from his person and against his will by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery.

The Court further instructs the Jury that there are three essential elements to the crime of robbery and that the State must prove each of these essential elements to you beyond a reasonable doubt. The three essential elements of robbery are:

1. Felonious intent.
2. Force or putting in fear as a

[TR 1416]

means of effectuating the intent.

3. And by that means taking and carry away the property of another from his person or in his presence and against his will.

The Court further instructs you that all three of these essential elements must concur in point of time.

The Court instructs you that "feloniously" means "the deliberate intention of committing a crime."

Therefore the Court instructs you that the State must prove to you by the evidence beyond a reasonable doubt each of the following essential elements:

1.

That Crawford Bullock, Jr. had a felonious intent to rob and take away the personal property of Mark Dickson prior to Mark Dickson's death.

[TR 1416]

2.

That Crawford Bullock, Jr. did in fact use force or put Mark Dickson in fear of some immediate injury to his person as a means of obtaining the personal property of Mark Dickson.

3.

That by Crawford Bullock, Jr. using the force or putting Mark Dickson in fear, Crawford Bullock, Jr. was able to take and carry away the personal property of Mark Dickson from his person or his presence and against his will.

The Court instructs you that if the State fails to convince you beyond a reasonable doubt from the evidence any one

[TR 1417]

of the three essential elements, then Crawford Bullock, Jr. is not guilty of robbery.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1417]

* * *

JURY INSTRUCTION NO. 15

The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on September 21, 1978, in the First Judicial District of Hinds County, Mississippi, Crawford Bullock, Jr., was present, consented to , and encouraged the commission of a crime and thereby aided another individual, and that he, the said Crawford Bullock, Jr. or the other, then and there did wilfully, unlawfully and feloniously take and carry away the personal property of another from the presence of Mark Dickson, and from his person, against his will, by violence to his person, to-wit; his billfold

[TR 1418]

or one 1978 Thunderbird automobile then in his possession, then and in that event, the Defendant, Crawford Bullock, Jr. is guilty of robbery as if he had with his own hands committed the whole offense; and, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in consert with another, while present at said time and place by consenting to the killing of the said, Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the

[TR 1418]

death of the said Mark Dickson, that the, and in that

[TR 1418]

event, the said Crawford Bullock, Jr., is guilty of capital murder, and the form of your verdict should be in the following form, written on a separate sheet of paper:

"We, the Jury, find the Defendant, Crawford Bullock, Jr., guilty of Capital Murder."

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B.D. D.C.

[TR 1419]

* * *

INSTRUCTION NO. 16

The Court instructs the Jury that in order to find the Defendant guilty of capital murder you must be convinced beyond a reasonable doubt from the evidence that the Defendant is guilty of each of the following:

1. That Crawford Bullock, Jr. did feloniously take or attempt to feloniously take the personal property of Mark Dickson, in his presence or from his person and against his will by violence to his person or by putting Mark Dickson in fear of some immediate injury to his person and

2. That in doing so, Crawford Bullock, Jr., did in fact kill Mark Dickson

[TR 1420]

without malice, without authority of law, and not in necessary self defense.

The Court further instructs you that if the State fails to prove to you any one of the above, beyond a reasonable doubt, then it is your sworn duty to find the Defendant, "Not Guilty."

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1420] D-23

* * *

INSTRUCTION NO. 17

The Court instructs the Jury that manslaughter is the killing of a human being without malice, in the heat of passion, without authority of law, and not in necessary self defense. Therefore, the Court instructs the Jury that before you can find the Defendant guilty of manslaughter, the State must have proven to you beyond a reasonable doubt from the evidence each of the following:

1. That Crawford Bullock, Jr. did in fact kill Mark Dickson.

2. That such killing or slaying was unlawful and felonious.

3. That Crawford Bullock, Jr. did not kill Mark Dickson in necessary self defense.

[TR 1421]

The Court further instructs you that if the State fails to prove to you any one of the above, beyond a reasonable doubt, then it is your sworn duty to find the Defendant "Not Guilty of Manslaughter."

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1421] D-24

* * *

JURY INSTRUCTION NO. 18

The Court instructs the jury that manslaughter is the killing of a human being, in the heat of passion, without malice, in a cruel or unusual manner, without authority of law, and not in necessary self defense; and if the Jury believes, from the evidence in this case, beyond a reasonable doubt, that the defendant, Crawford Bullock, Jr., so killed the deceased, Mark Dickson, then the Jury will find the Defendant guilty of manslaughter.

In that event the form of your verdict will be:

[TR 1422]

We, the Jury, find the Defendant guilty of manslaughter."

You should write your verdict on a separate sheet of paper.

Given

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

S-5 [TR 1422]

* * *

INSTRUCTION NO. 19

The Court charges the Jury that should you find him not guilty, the form of your verdict may be as follows:

"We the Jury, find the Defendant 'Not Guilty'."

Please write your verdict on a separate piece of paper.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1423] D-2

* * *

JURY INSTRUCTION NO. 20

You have found the defendant guilty of the crime of "Capital Murder." You must now decide whether the Defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the Defendant was convicted, and the Defendant himself.

To return the death penalty, you must unanimouly find from the evidence beyond a reasonable doubt that aggravating circumstances - those which tend to justify the death penalty - outweigh mitigating circumstances - those which tend to justify the less severe penalty of life imprisonment.

[TR 1424]

If you unanimously find from the evidence in this case, beyond a reasonable doubt, the following aggravating circumstances:

1. The capital murder was committed while the defendant, either alone or with another, was engaged in the commission of robbery;

2. The capital murder was committed for pecuniary gain;

3. The capital murder was especially heinous, atrocious or cruel;

4. The capital murder was committed for the purpose of avoiding lawful arrest;

then you must proceed to weigh the aggravating circumstances and the mitigating circumstances, one against the other, to determine whether the aggravating circumstances, if any, outweigh the

[TR 1424]

mitigating circumstances.

S-4 [TR 1424]

The mitigating circumstances which you may consider include the following:

1. The defendant has no significant history of criminal activity.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

3. The age of the defendant at the time of the crime.

4. Any circumstances or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against imposition of the death penalty.

5. Any circumstances or combination of circumstances surrounding the offense which reasonably mitigates against imposition of the death penalty.

[TR 1425]

6. The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

7. The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

8. The defendant acted under extreme duress or under the substantial domination of another person.

If you unanimously find from the evidence, beyond a reasonable doubt, any one or more of the aggravating circumstances listed above and, if, after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that the death

penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the the following form:

[TR 1425]

"We the Jury, find unanimously and beyond a reasonable doubt the folowing aggravating circumstances:

(List the aggravating circumstances, if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.)

"We, the Jury further find unanimously from the evidence and beyond a reasonable doubt that, after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh

[TR 1426]

the aggravating circumstances and that the defendant should suffer the penalty of death.

_____
FOREMAN OF THE JURY

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B.D. D.C.

S-4 [TR 1424]

If you fail to find any aggravating circumstances unanimously and beyond a reasonable doubt, or, if you find one or more aggravating circumstances unanimously and beyond a reasonable doubt, but after weighing the mitigating circumstances, one against the other, you fail to unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, then your verdict shall be in the following form:

> "We, the Jury, find that the defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the

[TR 1427]

Court and the Court shall, under the law, impose a sentence of imprisonment for life. Your verdict shall be in the following form:

> "We, the Jury, after due deliberation, have been unable to agree upon the punishment and hereby so certify and request the Court to dismiss the Jury from further deliberation."

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1427]

* * *

JURY INSTRUCTION NO. 21

SENTENCING PHASE

The Court instructs the Jury that in determining whether or not to assess the death penalty in this case, you may consider only those aggravating circumstances set out for you by the Court in these instructions which you unanimously find from the evidence beyond a reasonable doubt. The Court further instructs you that bias, passion, or prejudice, whether based on political, social, racial, religious or any other grounds, may not be the basis for or considered as an aggravating circumstance in this case, nor may they sway you in any

[TR 1428]

manner unfavorable to the defendant in your determination of whether or not to assess the death penalty as punishment.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By Barbara Dunn D.C.

S-1 [TR 1428]

* * *

INSTRUCTION NO. 22

The Court instructs the Jury that in deciding whether the Defendant, Crawford Bullock, Jr., should be sentenced to death or to life in prison, you must weigh the mitigating circumstances against the aggravating circumstances that you find to be established by the evidence. The fact that you have found Crawford Bullock, Jr. guilty beyond a reasonable doubt of the crime of capital murder is not itself an aggravating circumstance.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1429] D-26

* * *

INSTRUCTION NO. 23

The Court instructs the Jury that before you consider any fact as an aggravating circumstance, you must find that that fact has been established by the evidence beyond a reasonable doubt. You may not consider any fact as a reason for choosing to impose the death sentence unless you are satisfied beyond a reasonable doubt that that fact is true.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1430] D-27

* * *

INSTRUCTION NO. 24

The Court instructs the Jury that in order for you to impose the death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances. If you are not convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you must return a verdict of life imprisonment.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1431] D-28

* * *

INSTRUCTION NO. 25

The Court instructs the Jury that in reaching your decision on the question of punishment, you are to weigh the evidence in aggravation and mitigation, but you are cautioned, that in a case such as this, you are not to be influenced by any passion, prejudice or any other arbitrary factor.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1432] D-29

* * *

INSTRUCTION NO. 26

The Court instructs the Jury that the law requires that in order to impose a sentence of death, you must reach a unanimous decision. In the event you cannot reach a unanimous decision, the Defendant will be sentenced to life imprisonment.

Given
W.F.C.

Filed May 18, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By B. D. D.C.

[TR 1433] D-32

* * *

INSTRUCTION NO. _____

The definition of pecuniary is as follows: "Monetary; relating to money; financial; consisting of money or that which can be valued in money."

Given

Filed May 25, 1979
Wm. E. "Bill" McKinley
Circuit Clerk
By W.F.C. D.C.

[TR 1434]

* * *

BRIEF FOR APPELLANT

* * *

IV.

THE COURT ERRED IN NOT SUSTAINING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF ALL THE TESTIMONY, IN NOT GRANTING THE APPELLANT'S PEREMPTORY INSTRUCTION, AND IN NOT GRANTING THE APPELLANT'S MOTION TO REDUCE THE CHARGE TO MANSLAUGHTER MADE AT THE CLOSE OF ALL TESTIMONY AND ALSO, IN NOT GRANTING THE SAME MOTIONS MADE AT THE CLOSE OF THE STATE'S CASE IN CHIEF

In the interest of space and since the same arguments of law anf fact aply to this assignment of error, the Appellant incorporates all of the arguments of fact and law discussed in Error No. 1 and Error No. 3 into this assignment of error and

[-33-]

makes it a part hereof as if wholly written herein.

The Appellant would further show that all of the essential elements of murder or manslaughter were not proven and that none of the essential elements of robbery were proven. The State was under a duty to prove every essential element of robbery and since the State could not and did not prove any of the essential elements of robbery, the Court was under a duty to direct a verdict of acquittal on the charge of Capital Murder and release the Appellant or to at least reduce the charge to manslaughter since manslaughter ws the only lesser included offense which the Appellant may have been convicted of under the indictment if the State had proven all of the essential elements of manslaughter.

The Court could not just assume that there was a robbery because the Appellant had the automobile. He gave a good and reasonable explanation of why he had the car and as to what happened to the billfold and the explanation was consistent with innocence and was not substantially contradicted in the material particulars by the physical facts or by facts of common knowledge and under the Weathersby Rule the Court was required to accept his version as true.

Furthermore, the State never proved ownership of the automobile or right to possession by Mark Dickson.

* * *

[-34-]

* * *

PETITION FOR REHEARING
BY APPELLANT

* * *

5.

That the Court erred in not reversing Appellant's sentence of death, which was imposed upon a person who has not taken or attempted to take a life, nor intended to take a life, especially where the sentencing jury was not instructed to consider those factors in mitigation of punishment.

[-2-]

* * *

APPELLANT'S BRIEF IN SUPPORT OF
PETITION FOR REHEARING

* * *

Point V

THAT THE COURT ERRED IN NOT REVERSING APPELLANT'S SENTENCE OF DEATH, WHICH WAS IMPOSED UPON A PERSON WHO HAS NOT TAKEN OR ATTEMPTED TO TAKE A LIFE, NOR INTENDED TO TAKE A LIFE, ESPECIALLY WHERE THE SENTENCING JURY WAS NOT INSTRUCTED TO CONSIDER THOSE FACTORS IN MITIGATION OF PUNISHMENT.

Appellant's case squarely presents the question reserved by the United States Supreme Court in Lockett v. Ohio, 438 U.S. at 609 n. 16 (1978): whether a sentence of death may constitutionally be imposed on one who has not taken life,

[-8-]

attempted to take life or intended to take life, under circumstances where the jury charged with imposing punishment is not instructed to consider those factors in mitigation of sentence.

The facts basically establish that this defendant did not participate in the killing of this individual unless it was concluded that the two times that he grabbed this individual was in an effort to assist the Co-Defendant in the killing of the victim. However, there is no evidence to show that this was his purpose. His testimony was that he was attempting to

[-9-]

break up the fight. There is no evidence that the two defendants planned or created a common scheme to rob the victim. It would seem unlikely that they could have possibly discussed that they were going to rob the victim because they did not know that the victim was going to offer them a ride and the Appellant sat on the front seat and the Co-Defendant sat on the back seat. If there was a robbery attempt, it was created through the mind of the Co-Defendant without the Appellant's involvement. The Appellant's statement given to the police stated that they were not trying to rob the victim. There is nothing in the record to indicate that the Appellant had a expressed desire to take the life of the victim, that he attempted to take the life of the victim or that he did take the life of the victim. On the otherhand, there is uncontradicted evidence that the Co-Defendant did in fact

take the life of the victim. The Appellant was not armed nor was the Co-Defendant armed. The testimony by the Appellant indicates that there was simply a fight between the two youths who had been drinking and got into an argument and that he attempted to separate them. There was no where in the record where it was ever shown that the Appellant deliberately intended to take the life of the victim.

The United States Supreme Court has held that the unique and extreme penalty of death is not per se excessive or disproportionate where the condemned person has deliberately taken another's life. Gregg v. Georgia, 428 U.S. at 187 (1976), but

[-9-]

that it "is an excessive penalty for the rapist who, as such, does not take human

[-10-]

life," Coker v. Georgia, 433 U.S. 584, 598 (1977). The principle to be derived from these holdings is that it is constitutionally inappropriate for a state to extinguish the life of an offender who has not deliberately extinguished the life of his victim.

The United States Supreme Court has indicated tht the appropriate measure for determining whether a sentence is disproportionate or excessive is whether it comports with the "evolving standards of decency" reflected in contemporary community judgments on the propriety of a particular sentence. Gregg v. Georgia, 408 U.S. at 173, Coker v. Georgia, 433 U.S. at 592. The petitioner in Lockett presented a study of all executions for homicide since 1954 for which facts were available. Lockett v.

[-10-]

Ohio, supra, Brief for Petitioner, at 66 and App. B; 438 U.S. at 624-5 and n.6 (White, J. concurring). That study indicated that "only eight (out of 363) clearly involved individuals who did not personally commit murder." Id. Two of those eight had hired others to do the killing. Id. at 625 n.7. Two people have been executed since that study was conducted and both of them were the assailants in the offense. The statistics for the State of Mississippi contained in the Lockett study further reflect the community judgment that a person who has not killed should not be put to death; of the people executed since 1954, not a single person was executed for homicide where he was not personally, physically responsible for the death of the victim.

[-10-]

A study of all the cases decided by the Supreme Court of Mississippi since the State's mandatory statute was found unconstitutional reveals that there are only about two people sentenced to death, the Appellant being one of them, without being the actual perpetrator of the homicide. Thus, from either a national or state perspective, Appellant's death sentence is excessive and disproportionate, and its imposition, therefore, violates the Eighth and Fourteenth Amendments to

[-10-]

the Constitution of the United States.

Furthermore, it is clear that under Justice White's view, a death sentence may not be constitutionally imposed without an express finding "that the defendant engaged in conduct with the conscious purpose of producing death." Lockett v. Ohio, supra

[-11-]

438 U.S. at 628 (White, J., concurring).

Unless the jury responsible for the sentencing decision is informed that such a finding is necessary, and such a finding appears unambiguously in the record the imposition of a death sentence cannot stand. Where a jury is not instructed at the penalty phase to consider the Appellant's level of culpability or the nature of his mens rea in the offense, and the verdict of guilt is ambiguous as to its findings on these issues, it cannot be maintained that the Eighth Amendment requirement as articulated by Justice White has been met. Therefore, the Appellant's sentence should be reversed.

[-11-]

## Point VI

THE COURT ERRED IN NOT REVERSING APPELLANT'S DEATH SENTENCE, WHICH WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT, SINCE THIS COURT FAILED TO CONDUCT THE "MEANINGFUL APPELLATE REVIEW" REQUIRED BY THE UNITED STATES SUPREME COURT IN GREGG V. GEORGIA, 428 U.S. 153 (1976), BECAUSE THIS COURT DID NOT COMPARE APPELLANT'S CASE TO THOSE WHERE NO DEATH SENTENCE WAS IMPOSED AND FAILED TO COMPARE APPELLANT'S SENTENCE WITH THAT IMPOSED ON HIS CO-DEFENDANT.

The Mississippi Supreme Court in its opinion rendered against the Appellant, cites numerous cases in its effort to suport the fact that the Appellant should receive a death penalty. However, in reading these cases, the Appellant fails to see how the cases cited indicates that the Appellant

[-11-]

should receive a death sentence. On the otherhand, they indicate that if they were followed, that the Appellant should receive a life sentence. In most all of these cases the accomplice who did not do the killing was given a life sentence or a lesser sentence than death. The Appellant fails to see the Supreme Court's rationale in citing these cases to support the fact that he should receive the death penalty. By comparing the

[-11-]

cases similar to his, whereby he was not the triggerman, those individuals received a life sentence or a sentence less than life.

* * *

* * *

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

* * *

IV.

The Mississippi statutes constitute cruel and unsuaul punishment in that, as interpreted by the Supreme Court of Mississippi, an accomplice, although not actually killing any person, and with no intent to kill, may receive the death penalty. Thus, the statutes as applied are in conflict with this Court's opinion in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), wherein this Court held that the Eighth and Fourteenth Amendments forbid imposition of a sentence of death where there is no finding that the defendant acted with the "conscious purpose of producing death." 438 U.S. at p. 628.

[-8-]

As stated by Justice White:

> . . . the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed, any perceptible goals of punishment.
>
> 438 U.S. at p. 626.

[-8-]

Office-Supreme Court, U.S.
FILED
JUL 8 1985
ALEXANDER L. STEVAS,
CLERK

(4)

NO. 84-1236

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DONALD A. CABANA, SUPERINTENDENT, ET AL.,
Petitioners,

vs.

CRAWFORD BULLOCK, JR.,
Respondent.

# BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. Enmund: Is It a Question of Proportionality or A Question of Fact for the Jury?

2. Did the Court of Appeals Fail to Accord the Findings of the Mississippi Supreme Court the Presumption of Correctness Mandated by 28 U.S.C. § 2254(d)?

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2. The Court of Appeals Failed to Accord the Findings of the Mississippi Supreme Court the Presumption of Correctness Mandated by 28 U.S.C. § 2254(d).

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## I. INTRODUCTION

This matter is before the Court on Petition of Donald A. Cabana, Superintendent of the Mississippi State Penintentiary at Parchman, and Edwin Lloyd Pittman, Attorney General of the State of Mississippi, for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit wherein the Court reversed and rendered the decision of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus.

## II. OPINIONS BELOW

State Court: The opinion of the Supreme Court of Mississippi affirming

respondent's conviction of capital murder and sentence of death is reported as Bullock v. State, 391 So. 2d 601 (Miss. 1980) (See pp. A68-A117, Pet. for Cert.) The Court denied post-conviction collateral relief without opinion. The per curiam order denying the same was not published.

United States Supreme Court: This Court denied respondent's petition for writ of certiorari on direct appeal, and said denial is reported as Bullock v. Mississippi, 452 U.S. 931, 101 S. Ct. 3068, 69 L. Ed. 2d 432 (1981).

District Court: The opinion of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus is not reported. Bullock v. Lucas, S.D. Miss. No. J81-0357(N) (opinion dated June 29, 1983, Countiss, M., sitting as a

District Judge.) (See pp. A23-A67, Pet. for Cert.)

Court of Appeals: The panel decision of the Court of Appeals is reported as Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984) (See pp. A2-A20, Pet. for Cert.). The per curiam order of the Court of Appeals denying panel rehearing and suggestion of rehearing en banc is reported as Bullock v. Lucas, 747 F.2d 1465 (5th Cir. 1984) (See p. A1, Pet. for Cert.).

## III. JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 21, 1984. A timely petition for panel rehearing and suggestion of rehearing en banc was denied October 31, 1984. The judgment of the Court of Apeals was issued, as and for the mandate, on November 13, 1984. The jurisdiction of this Court, as

particularized hereafter, is invoked under 28 U.S.C. § 1254(1).

## IV. CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . . ";

The Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution as applied to the States through the Due Process Clause of the Fourteenth Amendment; 28 U.S.C. § 2254(a), viz.,

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person

> in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States";

and 28 U.S.C. § 2254(d), viz.,

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for te writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise apear, or the respondent shall admit --
>
> > (1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) That the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the

sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by trhe respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the

> burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

## V. STATEMENT OF THE CASE

### A. The Substantive Facts

The substantive facts as found by the Mississippi Supreme Court reflect that on the evening of September 21, 1978, Crawford Bullock, respondent, and Ricky Tucker, Bullock's future accomplice in this crime, pursued certain libationary diversions at the Town Creek Saloon located in the City of Jackson, Mississippi. Much to their chagrin, the pair discovered at closing time that the person with whom they had arrived had without so much as a fare-the-well departed the premises leaving

them afoot. Assuming the role as a "good Samaritan," Mark Dickson, the unfortunate victim of this scenario, offered the pair a ride.

On the way home, Bullock imposed upon Dickson to stop at a convenience store in order for him to purchase a loaf of bread. Dickson, continuing in the role as a benevolent benefactor, advanced Bullock the thirty-five cents (35¢) necessary to accomplish the purchase; however, the purchase money was returned when Bullock discoverd that the store was out of the desired commodity.

Dickson drove on at the riders' instructions. While proceeding down an uninhabited street, Bullock instructed Dickson to pull over so that he could answer "the call of nature." Upon return to the

automobile, Bullock testified that he overheard an argument between Tucker and Dickson and heard Tucker state, "Don't make me pull this gun." Dickson was thereupon heard to reply that he did not have any money but that they, Tucker and Bullock, could have the automobile. All three then re-entered the vehicle, and the argument continued. Dickson, apparently fearing injury, as rightly he should have been, stopped on Byrd Drive near the site where an overpass on Interstate 220 was being constructed and exited the vehicle. Blows were exchanged between Tucker and Dickson, and Dickson attempted to flee on foot. Tucker and Bullock pursued Dickson. Upon apprehending him, Tucker instructed Bullock to grab Dickson which he did by holding the hair of his head. At this point, Tucker, who had armed himself with a whiskey bottle, advanced on Dickson striking him several

times in the head with the bottle. During this rain of blows, the bottle broke and cut Bullock's hand. Tucker thereupon set upon Dickson striking him with fists, feet, concrete blocks and a 2 X 4 board. The evidence later showed that Dickson died as a result of having his skull crushed.

Upon completion of the heinous deed, Tucker suggested that they burn the body. However, Bullock alternatively suggested a lake south of Jackson in the Byrum Community where they could dispose of the body. Bullock's suggestion was accepted, and the two loaded Dickson's body into the car and drove to a car wash to remove the blood from the exterior of the vehicle. Tucker removed Dickson's wallet, rifled it, found no money, and discarded the same in a garbage can. Bullock then drove the vehicle to his residence where the two cleaned up. After

obtaining a garden hose from Bullock's yard the two proceeded south to Byrum. Upon arriving at the lake, Dickson's outer clothing was removed, concrete blocks placed in his underwear, and the garden hose with additional weights was wrapped around the body. Tucker then pulled the body out into the lake and submerged it. Bullock, apparently not satisfied with Tucker's efforts, waded out to where the body had been submerged and felt of the same with his feet to assure himself that the body was stuck in the mud at the bottom of the lake. This was accomplished in spite of the fact that Bullock was suffering from a previously fractured leg and had a plaster cast on the same.

Bullock and Tucker again returned to Bullock's residence where they again cleaned up. Bullock, driving Dickson's vehicle,

then took Tucker home and proceeded to the University of Mississippi Medical Center where he obtained medical attention for his hand. The following day, the pair drove Dickson's vehicle to McComb, Mississippi, for the stated purpose of visiting Bullock's grandfather. They failed to locate him and returned to Jackson. Bullock continued to retain possession of the Dickson automobile.

During the early morning hours of September 23, 1978, Bullock began to have pain in his hand and returned to the University Medical Center, again driving Dickson's vehicle. On his way back home, Bullock was stopped and arrested by officers of the Jackson Police Department and transported to the downtown precinct station. Upon being stopped and asked about the automobile he was driving, Bullock responded that he had borrowed it from a

friend. The tag which had been on the back seat on the night of the 21st had been attached to the appropriate fixture on the rear bumper.

Later, Bullock made inculpatory statements concerning the commission of the crime.[1]

---

1 During trial the following statement was introduced:

> My name is Crawford Bullock, Jr. I live at 2109 Capitol Court. I am twenty-one years old. On Thursday night, 9/21/78, a friend of mine, Rickey Tucker, and I were at the Town Creek Saloon. While we were there, we met Mark Dickson. When I got ready to leave, Mark Dickson offered me and Rickey Tucker a ride home. We left and started out west. We were in a 1978 Thunderbird color gray. The car belonged to Mark Dickson. We were going out West Capitol Street and Mark took a wrong turn and ended up on Lee Street. Mark stopped the car. I got out and took a leak. Mark and Rickey got out on the other side

of the car. At that time, I heard Rickey say: "Don't make me pull this gun". I then saw Mark take his billfold out and show it to Rickey and he said: "I don't have any money but you can take the car". Rickey then told him to get back in the car. Mark got back in the car and Rickey got in the back seat. We then went to Alabama Street and took a left on South Drive to Byrd Drive and then stopped beside an overhead bridge. Mark stopped the car. Rickey said grab him. I grabbed Mark. Rickey got out of the car and came around to the side where Mark was and then Mark ran. Rickey chased him and tackled him and started fighting with him. I came up and grabbed Mark by the hair and was holding him. Rickey came up with a whiskey bottle and hit Mark and also hit my hand cutting it very badly. At this time, I backed up and Rickey hit him about three times with his fist. Mark fell down and Rickey started jumping on his head and kicking him in the head. Rickey then picked up a piece of concrete and threw it down on Mark's head as hard as he could. Mark then started making some noises and blood started coming out of his nose. Rickey then started hitting him with a board. I then ran back to some cars that were parked across the street. I found the keys in one of them but it wouldn't crank. I

tried several more cars but we couldn't get any of them to crank. We then went back to where Mark was and we saw that he had stopped breathing. Rickey then asked me if I knew some place where we could carry him and I told him that I knew a place. I told him that I knew a place at Byrum that had a lake and we could put him in the lake.

We put him in the car and drove to a car wash in Highway 80. We then washed the car and Rickey got Mark's billfold out and went through it but there was no money in it. We threw it in a trash can there. We then left there and went to the Star station at Ellis and Lynch Street and got gas there. We left there and went to my house and got a green water hose to tie Mark up with. We left there, got on the interstate, got off at the Byrum exit and went to the Griffin Industries pond which is on the east side of the interstate. We stopped the car, got out and Rickey and I drug him up to the fence. Rickey got the hose and tied it a couple of times around his neck and pulled him about ten or fifteen yards and I told Rickey I couldn't pull any more. At this time, Rickey got under him and carried him to the pond and put him over in a boat that was there. The boat was chained and we could not use it. Rickey then took his pants off.

Rickey then got two pieces of cinder blocks and stuck one down in his underwear and the other one in his T-shirt. Rickey then carried him out in the water and sunk him. I looked and saw that part of the water hose was sticking out and so I then went out to where Rickey was. Rickey went under water and kept tying the hose around Mark until the hose was all tied up. Rickey then jumped up and down on Mark until he had him buried up in the mud. Rickey then called me to come there. I went to where he was and felt him with my foot and saw that he was down. After that, we went back to my house, washed up and went to the University Hospital where I got treatment for my hand.

Q. Crawford, did you, along with Rickey Tucker, get into a fight with Mark Dickson?

A. Yes, we did.

Q. Crawford, were you trying to rob Mark Dickson?

A. No, we were not.

Q. Crawford, during this fight, did you get your hand cut?

A. Yes, I did. It was cut when Rickey hit Mark with a whiskey bottle.

Q. Crawford, was Mark killed in this fight?

A. I think that he was killed when Rickey threw a piece of concrete on his head.

Q. After you and Rickey saw that he was dead, what did you do then?

A. We carried him to a lake on the Griffin Industries Property, weighed him down and sunk him in the lake.

Q. Crawford, can you read and write?

A. Yes, sir.

Q. Crawford, have any of the dectives present today threatened you in any way or promised you anything to get you to give this statement?

A. No, they have not.

Q. Crawford, after you have read this statement and find it to be true and correct just as you have told it to me, will you sign the statement?

A. Yes, I will.

Signed by Crawford Bullock, Jr. Time: 7:30 p.m. Witness: D. F. Fondren. Witness: R. D. Jordan [TR 1034-1037.]

In a second interview, respondent identified a belt buckle found by investigators at the site of the crime as belonging to Rickey Tucker and a flannel shirt as being his. However, he could not explain how a 2 x 4 covered with blood wound up on the top of the Interstate overpass. Finally, respondent admitted that he had known Dickson prior to September 21, 1978, that the only explanation he could give for the incident was that he and Tucker were high on drugs and beer and that Tucker was trying to rob Dickson.

## B. The Procedural History

On May 18,1979, respondent was found guilty of the crime of capital murder in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and pursuant to the Mississippi's statutory bifurcated procedure, was sentenced to death by lethal gas. [Miss. Code Ann. § 99-19-101 (Cum. Supp. 1979)]. Upon timely notice respondent exercised his right to appeal both his conviction and sentence to the Mississippi Supreme Court. [Miss. Code Ann. § 99-19-105 (Cum. Supp. 1979)]. On August 6, 1980, the Court sitting en banc unanimously affirmed the aforesaid, and on January 14, 1981, denied rehearing. Bullock v. State, 391 So.2d 601 (Miss. 1980).

Consistently through out both the trial proceedings and on appeal to the Mississippi Supreme Court, counsel for the respondent, challenged the imposition of a sentence of death for crime charged in the indictment, viz., that the respondent was charged as aiding and abetting in the commission of an unintentional homicide and as such could not be sentenced to death. Prior to trial respondent filed, among other things, A Motion to Quash Indictment and Declare Statute Unconstitutional assigning in pertinent part as grounds the following:

2.

> The statute on which the indictment is based, Miss. Code Ann. Section 97-3-19 (2) (e) (Cum. Supp. 1977) is unconstitutional and violative on its face and, particularly as applied in this case, of the Eighth and Fourteenth Amendments to the Constitution of the United State [sic] of America in that:

* * *

(b) The statute inflects the cruel and unusual punishment of death, as applied, for the unintentional killing of a human being with-out deliberate design to effect the death of a human being whereas another criminal statute, Miss. Code Ann. Section 97-3-19 (1)(A); [sic] inflicts a lesser maximum punishment of life imprisonment for the intentional killing of a human being with design to effect the death of the person killed and other criminal statutes, Miss. Code Ann. [sic] Section 97-3-19 (b) and (c) inflict a lesser maximum punishment for virtually the same unintentional killing charged in the instant indictment, all in violation of Equal Protection of the Laws and of the Eighth and Fourteenth Amendments to the United States Constitution, and Section 14 of the Mississippi Constitution (1890), and the death penalty is not a deterrant generally or to the acts charged in the indictment . . . .

[J. A. at 4-6; TR 70-71]

Consistent with this argument, counsel at the close of the guilt phase objected to and was in fact successful in precluding from the jury's consideration a lesser included charge of simple murder thereby limited the issues to a finding of either capital murder or manslaughter. [J.A. at 12-36; TR 1233-45].

On appeal respondent renewed his objections and assigned as grounds that "[t]he Court erred in not sustaining the appellant's motion for a directed verdict made at the close of all the testimony, in not granting the appellant's peremptory instruction, and in not granting the appellant's motion to reduce the charge to manslaughter made at the close of all testimony and also, in not granting the same motions made at the close of the State's case in chief." J.A. at 113-115; Brief of Appellant at 33.

In responding to the rather cryptic argument in support of the proposition, the Mississippi Supreme Court in pertinent part held:

IV.

> Did the trial court err in refusing to grant appellant's requested premptory instruction and in refusing to reduce the charge to manslaughter?
>
> In passing upon a requsted premptory instruction, or motion for directed verdict, in a criminal case, all evidence most favorable to the State, together with reasonable inferences, are considered as true and evidence favorable to the appellant is disregarded. If such evidence will support a guilty verdict, the request for premptory instruction must be denied, as well as the motion for directed verdict. Warn v. State, 349 So. 2d 1055 (Miss. 1977); Toliver v. State, 337 So. 2d 1274 (Miss. 1976).

> In the case sub judice, appellant argues that there was no evidence of intent to rob Dickson and that appellant was an unwilling participant in the robbery-homicide. The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson and in removing and discarding his wallet and personal effects therin, and in the taking of the T-bird automobile, which was in the lawful possession and use of Dickson.
>
> The trial court did not err in refusing to grant the preemptory instruction of not guilty. Likewise, the court committed no error in declining to reduce the charge from capital murder to manslaughter. Even so, the question of manslaughter was submitted to the jury upon a proper instruction.
>
> Bullock v. State, supra, at 606-607; Pet. for Cert. at A80-A82.

Later, the Court in performing its mandatory proportionality review in part found:

We have held in Jackson, and pursuant to the above section, that cases in which a death sentence is imposed will be automatically reviewed as preference cases by this Court; that the record will be reviewed and compared with similar cases to determine whether the punishment of death is too great when the aggravating and mitigrating circumstances are weighed against each other in order to assure that the death penalty will not be wantonly or freakishly imposed; and only will be inflicted in a consistent and even-handed manner under like or similar circumstances.

Since Jackson v. State, 337 So.2d 1242 (Miss. 1976), eleven (11) capital murder cases have been decided by this Court. Seven (7) of those cases have involved felony (robbery) murder. Reddix v. State, 381 So.2d 999 (Miss. 1980); Jones v. State, 381 So.2d 983 (Miss. 1980); Culberson v. State, 379 So.2d 499 (Miss. 1979); Irving v. State, 361 So.2d 1360 (Miss. 1978); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Washington v. State, 361 So.2d 61 (Miss. 1978); Bell v. State, 360 So.2d 1206.

We have carefully reviewed those cases and compared them with the case and sentence sub judice. Appellant contends that the extent of his involvement in the crime was as an acomplice, who did not strike the fatal blow, and that Tucker was the principal, who killed the victim. He argues that Tucker was given life imprisonment by the jury, which tried him; that appellant should not receive a greater or harsher penalty than Tucker; and that appelant's death sentence should be reduced to life imprisonment.

* * *

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Sandra Lockett was charged with aggravated murder with aggravating specifications. She and three (3) others conspired to rob a pawnbroker's shop. Lockett remained in the getaway automobile with the engine running, the other three entered the pawn shop and during the robbery, Parker, one of the three, killed the proprietor. Prior to trial, Parker pleaded guilty to the murder charge, and agreed to testify against Lockett and the other two. In return, the prosecutor dismissed the aggravated robbery charge and the specifications to the murder charge which limited the possibility that Parker could receive the death penalty.

Two weeks before Lockett's separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery, offenses which carried a maximum penalty of twenty-five (25) years imprisonment. Prior to the trial, he offered to permit her to enter a plea a guilty to aggravated murder without specifications, an

offense carrying a mandatory life penalty. These plea bargaining offers were rejected by Lockett; she was tried and was given the death penalty.

Although the case was reversed on another ground, the question was raised as to whether or not Lockett's conviction as an aider and abetter of the actual killer was invalid on the ground that the interpretation by the Ohio Supreme Court of the complicity provisions of the Ohio statute, under which the defendant was convicted, was so unexpected that it deprived her of her due proce right to fair warning of the crime with which she was charged.

The United States Supreme Court held that her conviction as an aider and abetter of the actual killer was not invalid.

* * *

In the case at bar, there is no record of the aggravating circumstances and mitigating circumstances in the trial of Tucker, and it is not possible to determine what circumstances influenced the jury in its life verdict. The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender. Jones v. State, 307 So.2d 549 (Miss. 1975); Bass v. State, 231 So.2d 495 (Miss. 1970); McBroom v. State, 217 Miss. 338, 64 So.2d 144 (1953).

When we compare the present case to other capital cases, which have been afirmed by this Court on the death penalty, the present robbery-murder is equally as wanton, cruel, senseless, heinous and atricious as those. The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to those crimes so as to require this Court to reduce the sentence to life imprisonment. [emphasis added].

Id., at 612-614; Pet. for Cert. at A108-A117.

Succintly focusing on the Court's citation of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S. Ct. 2954 (1978), and in particular Justice White's separate opinion therein, respondent sought rehearing contending that:

> The Court erred in not reversing Appellant's sentence of death, which was imposed upon a person who has not taken or attempted to take a life, especially where the sentencing jury was not instructed to consider those factors in mitigation of punishment.
>
> J.A. at 116.[2]

As noted infra, rehearing was denied without opinion.

On March 14, 1981, respondent filed a Petition for Writ of Certiorari with this Court. In particular, his fourth ground

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[2] The entire text of the argument in support of this proposition appears on page 117 through 126 in the Joint Appendix.

urged for grant of the writ contended:

> The Mississippi statutes constitute cruel and unusual punishment in that, as interpreted by the Supreme Court of Mississippi, an accomplice, although not actually killing any person, and with no intent to kill, may receive the death penalty. Thus, the statutes as applied are in conflict with this Court's opinion in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), wherein this Court held that the Eighth and Fourteenth Amendments forbid imposition of a sentence of death where there is no finding that the defendant acted with the "conscious purpose of producing death." 438 U.S. at p. 628. As stated by Justice White:
>
> > . . . the infliction of death upon those who had no intent to bring about the death of the victim [sic] is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed, any perceptible goals of punishment.
>
> 438 U.S. at p. 626.
> J.A. at 128.

Relief was denied on June 8, 1981. Bullock v. Mississippi, 452 U.S. 931, 101 S. Ct. 3068, 69 L.Ed.2d 432 (1981).

On July 28, 1981, respondent simultaneiously filed an Application for Leave to File a Petition for Writ of Error Coram Nobis with the Mississippi Supreme Court [Miss. Code Ann. § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Laws of 1984)] and a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Mississippi containing identical grounds for relief. On January 29, 1981, the Honorable William Harold Cox, Senior United States District Judge, stayed the execution of sentence pending

further disposition. Among the grounds raised in the identical petitions, responded contended:

> His sentence of death is excessive and disproportionate in violation of the Eighth and Fourteenth Amendments because the jury was not required to find that petitioner intended to kill.

On October 7, 1981, Presiding Justice Roy Noble Lee speaking for an unanimous court denied respondent's State application without opinion.

Upon denial of relief in the State Courts, the parties' attention was once again focused on the Federal proceedings. On August 16, 1982, the Honorable Walter L. Nixon, Jr., Chief Judge, entered an order referring this matter to the Honorable John R. Countiss, III, United States Magistrate, pursuant to an agreement of the parties under 28 U.S.C. § 656 (c) to conduct any and

all further proceedings in the case and order entry of judgment. On October 13 and 14, 1982, the Court conducted an evidentiary hearing and on June 30, 1983, filed an order denying relief.

In its memorandum opinion the District Court initially noted that Instruction 15 (J.A. at 87) given during the guilt phase mandated that before the jury could convict the respondent they must first find that he "consented to the killing" and did an "act which was immediately connected with or leading to [the murder's] commission." Pet. for Cert. at A28-A29. The Court held:

> The presumption, therefore arises that the jury found that Petitioner participated in the actual killing, that he did an act in furtherance of the actual killing, and that he consented to the killing. Jordan v. Watkins, 691 F.2d 1067 (5th Cir. 1982).

In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . . " 391 So. 2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.

Under Enmund, all that must be shown is that a defendant killed during the course of the commission of a felony. Without question the jury and the Mississippi Supreme Court found that Petitioner was present aiding and abetting in the commission of the homicide and that he committed an act in its consumation; however, the Mississippi Supreme Court further held that Petitioner consented to the killing. Petitioner's conviction was some three years, and the Supreme Court's opinion some two years prior to the decision in Enmund and is,

> therefore, not couched in its terms. Nevertheless, the reasonable interpretation of both the verdict and the opinion is that the consenting to, and actually committing an act in furtherance of, the homicide, Petitioner by legal definition actually killed. Moreover, by finding that the Petitioner consented to the homicide, the jury by definition found that he contemplated that lethal force would be employed. The Enmund criteria, therefore, were met.
>
> Pet. for Cert. at A29-A31.

On July 22, 1983, the Court entered a final judgment and denied respondent a certificate of probable cause under 28 U.S.C. § 2253. On July 25, 1983, respondent, represented by new counsel, moved for rehearing, and on August 5, 1983, a stay was entered pending briefing and argument. On September 1, 1983, arugments were heard. Upon due consideration the

motion was granted in part and denied in part with the Court reversing its position on the certificate of probable cause and the stay of execution pending appeal to the Fifth Circuit.

The Court of Appeals relying on its decision in Reddix v. Thigpen, 728 F.2d 705, reh. den., 732 F.2d 494 (5th Cir.), cert. den., _____U.S._____, 105 S. Ct. 397, 83 L.Ed.2d 331 (1984), reversed holding that in the absence of a talismatic finding by the jury that the defendant either killed, attempted to kill, intended to kill or contemplated that lethal force would be used the sentence of death was in violation of the Eighth and Fourteenth Amendments.

## VI. SUMMARY OF THE ARGUMENT

The instant petition presents two questions. The first concerns the correct interpretation of this Court's decision in Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 140, 102 S. Ct. 3368 (1982).

The second, a somewhat related question, inquires as to whether the Court of Appeals failed to accord certain factual findings made by the Mississippi Supreme Court the required presumption of correctness as mandated by 28 U.S.C. § 2254(d).

The thesis of petitioner's argument in the context of the first proposition focuses upon this Court's decisions in Solem v. Helm, ____U.S.____, 77 L.Ed.2d 637, 103

S. Ct. 3001 (1983), and Pulley v. Harris, ____U.S.____, 79 L.Ed.2d 29, 104 S. Ct. 871 (1984), and the Eleventh Circuit decision in Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985). Succintly stated, petitioners contend that contrary to the ruling of the Fifth Circuit herein Enmund did not engraph the requirement that the jury during the sentencing phase of a capital proceeding return a special verdict relating to the defendant's individual culpability into the body of Eighth Amendment law. Instead, Enmund is a question of proportionality review to be performed by State appellate courts.

The thesis of the second issue focuses on the finding by the Mississippi Supreme Court that respondent was present and was an active and willing participant

in the killing of the victim and the failure of the Court of Appeals to accord such a finding the presumption of correctness mandated by 28 U.S.C. § 2254(d).

## VII. ISSUES, ARGUMENTS & AUTHORITIES

### 1. Enmund: Is it a Question of Proportionality or a Question of Fact for the Jury?

In Enmund v. Florida, 458 U.S. 782, 801, 73 L.Ed.2d 140, 1154, 102 S. Ct. 3368 (1982), this Court vacated the death sentence holding:

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

Herein lies the conundrum. Essentially, two opposing schools of thought have developed concerning the enterpretation of the ruling in Enmund. On the one hand, one school, represented by the Fifth Circuit, has concluded that before death may

be constitutionally imposed there must first be a talismatic finding by the jury that the defendant either killed, attempted to kill, intended to kill or contemplated that lethal force would be utilized. See: Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982); Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982); Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983); Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984). In Jones v. Thigpen, 741 F.2d 805 (5th Cir.), petition for cert. filed, 53 U.S.L.W. 3720 (U.S. Jan. 30, 1985) (No. 84- 1237), the Court summarized its position thusly:

> Enmund requires that before a state may impose the uniquely severe and irrebocable sentence of death it must "focus on the personal intent and culpability of the defendant

> himself, and not merely that of an accomplice." Reddix, 728 F.2d at 708. To that end, the Court established an Eighth Amendment principle that exists at two levels: first, an accused may not constitutionally receive the death penalty except upon a finding that he himself killed, attempted to kill, or intended to kill; and second, he may not be sentenced to death unless that finding is supported by sufficient evidence in the record. See Skillern, 720 F.2d at 843-49.
>
> Id., at 812

The opposing school, represented by the Eleventh Circuit, specifically rejects the position taken by the Fifth and views the matter as a question proportionality review. For example in Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985), the Court en banc held:

> In our opinion, the question of whether the defendant's culpability satisfies the eighth amendment is sufficiently

distinct from the question of the defendant's guilt that a specific jury finding is not constitutionally required. The necessity of ensuring that the jury finds every element of the crime beyond a reasonable doubt focuses on procedural due process concerns, see United States v. U.S. Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978), whereas the proportionality review mandated by Enmund is aimed at ensuring that imposition of the death penalty is not excessive in light of the defendant's culpability. 102 S. Ct. at 3377. We see no reason why the Enmund inquiry need be characterized as an additional element that the state must prove to the jury beyond a reasonable doubt at the guilt or sentencing phase before the death penalty lawfully can be imposed, so long as a reviewing court can determine from the record that the eighth amendment has been satisfied. It may very well be that a specific jury finding on the defendant's intent or an "Enmund instruction" at the sentencing hearing is desirable, to develop a record that will assist a reviewing court in conducting a proper

> proportionality review in a particular case. We decline to transform the desirability of such procedures, however, into a constitutional requirement that the trier of fact make specific Enmumd findings, such that every defendant sentenced to death without express jury findings on culpability is entitled to a new sentencing hearing.

Id., at 1488.

Of the two, the latter from both a historical and logical perspective is the better reasonaed interpretation.

A.

Historically speaking, the issue presented in Enmund concerned the disproportionality of a sentence of death where the Florida Supreme Court had determined that the record did "not warrant a finding that Enmund had any intention of participating in or facilitating a murder." 73 L.Ed.2d at 1152.

A review of the opinion of the Florida Supreme Court in Enmund v. State, 399 So. 2d 1362 (Fla. 1981), supplies some insight into the situation. The thesis of Enmund's argument was summarized thusly:

> The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to each of the homicides is murder in the second degree, based on the felony murder rule. [emphasis added].
>
> Id., at 1368.

The controversey, therefore, raged over a concern of whether Enmund could be convicted of first degree felony murder or second degree felony murder; viz., the degree of Enmund's personal participation in the commission of the murder. In reaching its ultimate conclusion the Court citing Dixon v. State, 283 So. 2d 1(Fla. 1973), thoroughly discussed the Florida Law of Parties noting in particular that there is a distinction between principles in the first and second degree and accessories before the fact. Likewise, the Court determined that death could be imposed if Enmund was a principle in the first degree to either the homicide or the robbery. In particular the Court noted:

We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him as accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." State v. Dixon, 283 So. 2d at 11.

All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present,

> aiding and abetting the actual perpetrator, is a priuncipal of the second degree. They are both equally guilty of the crime bing committed. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit such offense." Kauz v. State, 98 Fla. 687, 124 So. 177, 178 (1929). See generally Henderson v. State, 70 So. 2d 358 (Fla. 1954); Albritton v. State, 32 Fla. 358, 13 So. 955 (1893).
>
> Id., at 1369.

Although acknowledging that the Legislature had purportedly repealed the three distinctions by the enactment of Section 776.011, Florida Statutes (1973), it found that the distinctions had been incorporated in the 1972 amendments to the murder statutes. Ch. 72-724, 1972 Gen. Law Fla. Consequently, the Court found that the

previous body of the Law of Parties was relevant to their determination. The Court then proceeded to hold:

> In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. E.g. Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Furthermore, the presence of the aider and abettor need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission. Id. 84 Fla. at 446, 94 So. at 871.
>
> Id., at 1370.

Hence, we find the comments of this Court to the effect that

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments. [emphasis added]

73 L.Ed.2d at 1145-46.

From this point this Court proceeded to elaborate on the proposition that the Eighth and Fourteenth Amendments are violated when a State seeks to impose death upon a "defendant [who] somehow participated in a robbery in the course of which a murder was committed." 73 L.Ed.2d at 1148. To this extent, the court in reviewing all death sentences imposed as of October 1, 1981,[3] for which sufficient data was available, held:

> That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population. As of October 1, 1981, there were 796 inmates under sentences

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[3] The opinion by the Mississippi Supreme Court affirming the conviction and sentence herein were published on August 6, 1980.

> of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal asault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kil the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar. [empahsis added]

Who then is required to make the appropriate finding?

B.

The key to the solution may be found in Enmund proper. Noting that the Florida Supreme Court's interpretation of the facts was in sharp variance with those found by the trial judge, this Court commented that

The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. 399 So. 2d, at 1372. Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. The dissent, while conceding that this holding negated the finding that Enmund was one of the triggermen, argues that the trial court's finding that Enmund planned the robbery was implicitly affirmed. Post, at 809, 73 L.Ed.2d, at 1159. As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us, since the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not

> Enmund intended that life be taken or anticipated that lethal force would be used.
>
> Enmund, 73 L.Ed.2d at 1145 n.2.

Consistently throughout the opinion, the Court referenced its comments toward actions taken by the State Supreme Court. E.g., 73 L.Ed.2d at 1144 ("The Florida Supreme Court afirmed Enmund's conviction and sentence. It found . . . ") ("Although petitioner could be convicted of second degree murder only if he were an accessory before the fact rather than a principal, the Florida Supreme Court reasoned . . . "); 73 L.Ed.2d at 1145 ("As recounted above, the Florida Supreme Court held that the facts supported no more than an inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers

escape"); 73 L.Ed.2d at 1152 ("Enmund himself did not kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder"); 73 L.Ed.2d at 1154 ("Because the Florida Supreme Court affirmed the death penalty . . . ").

Ignoring this aspect of Enmund and in particular the fact that the trial judge had entered findings to the effect that Enmund had planned the robbery and had actually killed the Kerseys, the Fifth Circuit has consistently imposed the requirement that the jury must return in essence a special verdict relative to the extent of the defendant's involvement in the crime. To this end, we note the Court's comments here:

> Bullock contends that his death sentence is constitutionally infirm under Enmund because the instructions to the jury permitted the death sentence without a specific finding that Bullock either killed, attempted to kill, or intended a killing or the use of lethal force. Such was the argument proffered in Reddix. We were persuaded in Reddix; we are likewise now so persuaded.
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> Bullock v. Lucas, supra, at 247.

The rationale apparently underpinning this ruling rests upon a misperceived concept that Enmund has in essence constitutionally imposed upon the State's an additional duty to prove intent prior to imposition of a sentence of death. In Reddix v. Thigpen, supra, the Court while titularly acknowledged that Enmund did not alter the substantive law of felonious intent in the context of felony murder,

premised its decision on the proposition that Enmund required the State to "focus on the personal intent and culpability of the defendant himself." Id., at 708.

Again in the rather curious case of Clark v. Louisiana State Penitentiary, supra, the Court citing Enmund as well as Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975), and Sandstom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979), vacated a conviction of first degree murder noting that the evidence was sufficient to prove robbery and perhaps murder but found the instructions to be deficient because the jury was not required to find that Clark "intended to kill or to do great harm." Id., at 77.

In Skillern v. Estelle, supra, the Court noted that although Texas law required the jury to find beyond a reasonable doubt

that the defendant's conduct which caused the victim's death was committed deliberately and with the reasonable expectation that the victim's death would result, the trial court should have given an addition instruction to the effect "that the Texas law of a party's criminal responsibility for the act of another did not supply the accused's deliberate intent and reasonable expectation that death would result . . ." Id., at 848.

The end result is that the Fifth Circuit has now elevated the question of intent or culpability into an absolute defense to a sentence of death. Cf., Colo. RW Stat § 16-11-103(5)(d).

C.

Such a conclusion completely disregards the premise upon which Enmund was decided; i.e., that a sentence of death is disproportionate to the crime where the proof fails to demonstrate that the defendant neither killed, attempted to kill, intended to kill or contemplated that lethal force would be used. In Pulley v. Harris, ____U.S._____, 79 L.Ed.2d 29, 104 S. Ct. 871 (1984), the Court had these comments on the subject:

> At the outset, we should more clearly identify the issue before us. Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck

> down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. See, e.g., Solem v Helm, _____ U.S. _____, 77 L.Ed.2d 637, 103 S. Ct. 3001 (1983); Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S. Ct. 3368 (1982); Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S. Ct. 2861, (1977). The death penalty is not in all cases a disproportionate penalty in this sense. Gregg v. Georgia, 428 U.S. 153, 187, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976) (opinion of Justices Stewart, Powell, and Stevens); id., at 226, 49 L.Ed.2d 859, 96 S. Ct. 2909 (White, J., concurring).
>
> 79 L.Ed.2d at 35-36.

Again in Solem v. Helm, _____ U.S. _____, 77 L.Ed.2d 637, 103 S. Ct. 3001 (1983), the Court addressed in particular the principles of proportionality review embodied in Enmund:

Most recently, the Court has applied the principle of proportionality to hold capital punishment excesive in certain circumstances. Enmund v. Florida, 458 U.S. ___, 73 L.Ed.2d 1140, 102 S. Ct. 3368 (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592, 53 L.Ed.2d 982, 97 S. Ct. 2861 (1977) (plurality opinion) ("sentence of death is grossly disporportionate and excessive punishment for the crime of rape"); id., at 601, 53 L.Ed.2d 982, 97 S. Ct. 2861 (Powell, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e.g., Hutto v. Finney, 437 U.S. 678, 685, 57 L.Ed.2d 522, 98 S. Ct. 2565 (1978); Ingraham

v. Wright, 430 U.S. 651, 667, 51 L.Ed.2d 711, 97 S. Ct. 1401 (1977); Gregg v. Georgia, 428 U.S. 153, 171-172, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); cf. Hutto v. Davis, 454 U.S. 370, 374, and n 3 70 L.Ed.2d 556, 102 S. Ct. 703, (1982) (per curiam) (recognizing that some prison sentences may be constitutionally disproportionate); Rummel v. Estelle, 445 U.S. at 274, n. 11, 63 L.Ed.2d 382, 100 S. Ct. 1133 (same)

77 L.Ed.2d at 647-48.

Continuing, the Court noted that the Eighth Amendment mandated that a criminal sentence must be proportionate to the crime. The Court then discussed three objective factors by which sentences are to be "reviewed". First, courts should "look to the gravity of the offense and the harshness of the penalty." 77 L.Ed.2d at 649. Citing Enmund as an example, the Court noted that it had "examined the circum-

stances of the defendant's crime in great detail," 77 L.Ed.2d at 650, and found that the penalty was disproportionate to his individual culpability.

Next, the Court suggested that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction." 77 L.Ed.2d at 649. The Court elaborated noting that such a comparison was not to be limited to the same or similar offenses but to all crimes. Here again the Court cited Enmund as an example stating that it had noted all of the other felony murders on death row in Florida were more culpable than Enmund.

Finally, the Court suggested that comparison of sentences imposed for commission of the same crime in other jurisdictions. Again Enmund was cited an an example:

In Enmund the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jursdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U.S., at ____, 73 L.Ed.2d 1140, 102 S. Ct. 3368. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. Id., at ___, n 22, 73 L.Ed.2d 1140, 102 S. Ct. 3368. The Court's review of foreign law also supported its conclusion. Id., at _____, n 22, 73 L.Ed.2d 1140, 102 S. Ct. 3368. The analysis in Coker was essentially the same. 433 U.S., at 593-597, 53 L.Ed.2d 982, 97 S. Ct. 2861. And in Weems the Court relied on the fact that under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U.S., at 380, 54 L. Ed. 793, 30 S. Ct. 544. Cf. Trop v. Dulles, 356 U.S. 86, 102-103, 2 L.Ed.2d 630, 78 S. Ct. 590 (1958) (plurality opinion) [emphasis added]

77 L.Ed.2d at 650.

Thus, Pulley v. Harris, supra, and Solem v. Helm, supra, clearly establish that the individualized treatment envisage by Enmund is not a factual question to be decided by a jury but is instead a question of proportionality to be decided by an appellate court. To be sure, in Solem v. Helm, supra, the Court rather unabashedly stated that it had actually examined the facts to reach the conclusion that the requisite showing of culpability had not been met.

Consequently, the question is whether the record supports a finding that the defendant was sufficiently culpable to warrant the imposition of the death penalty.

The position taken by the Fifth

Circuit throws the entire system out of sync.[4] On the one hand, as part of the three point test enumerated in Solem, an appellate court is required to look to the gravity of the offense and the harshness of the penalty. As indicated this includes an independent review of the facts to determine the level of culpability. Why then should the jury be required to perform a superfulous act? We have found no constitutional support for such and suggest that the mandatory proportionality review as prescribed by Miss. Code Ann. § 99-19-105 (cum. supp. 1984) is adequate to insure the necessary individualized consideration on this point.

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[4] To be sure, the position taken by the Fifth Circuit on the Enmund question appears to contradict the position taken in Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), to the effect that it is not necessary to the trial court to give limiting instructions or define the aggravating circumstances where State law requires the State appellate courts to independently review the evidence and determine whether such supports the jury's findings prior to affirming a sentence of death. Cf., Moore v. Fant, 722 F.2d 640 (11th Cir. 1983).

D.

Digressing momentarily, let us examine the capital review procedures established in Mississippi.

Similar in nature to the procedures outlined in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976), Mississippi law in addition to the conventional appellate processes provides for mandatory appellate review of all sentences wherein death has been imposed. In Williams v. State, 445 So. 2d 789, 811 (Miss. 1984), the Court elaborated upon the requirements contained in Miss. Code Ann. § 99-19-105 (cum. supp.) thusly:

> . . . section 99-19-105 (3)(a) mandates that we review any death sentence to determine whether it has been

"imposed under the influence of passion, prejudice, or any other arbitrary factor." This is the same test we apply in any criminal case in determining whether we should order a new trial on the grounds that the verdict was against the overwhelming weight of the evidence. See, e.g. Quarles v. State, 199 So. 2d 58, 61 (Miss. 1967); Pearson v. State, 428 So. 2d 1361, 1364 (Miss. 1983). It is rare that we invoke this power to order a new trial.

Section 99-19-105(3)(b) requires us to review any death sentence to determine whether there is evidence in support of the jury's finding of a "statutory aggravating circumstance." This is nothing more than the familiar test we apply when a defendant argues here that the trial judge should have entered a judgment of acquittal notwithstanding the verdict of the jury. See, for example, Gandy v. State, 438 So. 2d 279, 284-285 (Miss. 1983). Our power to interfere with the jury's verdict here is even more restricted than under the new trial test of section 99-19-105(3)(a). See Mister

v. State, 190 So. 2d 869, 871 (Miss. 1966).

Finally, we are required to perform what has come to be known as "proportionality review" to determine:

> [W]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> [Mississippi Code Annotated §§ 99-19-105(3)(c)]

Our experience in the review of death sentences under this section makes it clear that reversal will be extremely rare. Out of twenty-five death penalty cases decided here since hte proportionality review statute has been in place, only two have resulted in the sentence being vacated on this ground. Coleman v. State, 378 So. 2d 640 (Miss. 1979); and Edwards v. State.

As indicated, the Court has on two occasions vacated sentences which it perceived as disproportionate. Coleman v.

State, 378 So. 2d 640 (Miss. 1979); Edwards v. State, 441 So. 2d 84 (Miss. 1983). Concomitantly, the Mississippi Supreme Court has construed § 99-19-105 as inherantly requiring a heightened standard of review in considering the sentencing phase of a capital proceeding. See: Williams v. State, supra; Jones v. State, 461 So. 2d 686 (Miss. 1984.

Within this context, the Court has on several occasions reversed a sentence for what it perceived to be cummulative error, i.e., an error that which standing alone would not merit reversal, or for a perceived denial of fundamental fairness. See: Mhoon v. State, 464 So. 2d 756 (Miss. 1985) (Defendant denied fair trial where over one half of the venire was either in or related to someine in law enforcement); Wiley v. State, 449 So. 2d 756 (Miss. 1984)

(Prosecutorial comments concerning right of appellate review constitute plain error); Williams v. State, supra (although defendant did not object to alleged errors and standing alone none constitute plain error, considered cummulatively the defendant was denied a fair sentencing hearing). See also: Cannaday v. State, 455 So. 2d 713 (Miss. 1984)

Agreeing sub silentio with the analysis contained herein, the Mississippi Supreme Court has traditionally construed individual culpability to be a question reserved to proportionality review. In particular, we note the citation infra to those portions of the Mississippi Supreme Court's dicussion of Bullock's culpability, vis-a-vis Tucker's and whether Bullock's sentence was disproportionate in light

thereof. Concluding that respondent was "an active participant in the assault and homicide" the Court concluded that the sentence was appropriate under the circumstances.[5]

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5 Most courts which have addressed the question have distinguished Enmund where the proof demonstrated that the defendant was present and an active participant in the homicide. See: James v. State, 453 So. 2d 786 (Fla. 1984); State v. Willie, 436 So. 2d 553 (La. 1933) Smith v. State, 424 So. 2d 725 (Fla. 1982); State v. Aquiar, 418 So. 2d 245 (Fla. 1982); People v. Garcia, 454 N.E.2d 274 (III. 1983); Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (1984); State v. Oliver, 309 NC 326, 307 S.E.2d 304 (1983); Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983); State v. Yates, 310 S.E.2d 805 (SC 1982); Johnson v. Fant, 249 Ga. 812, 295 S.E.2d 63 (1982); Buthum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982); Copeland v. State, 457 So. 2d 1012 (Fla. 1984); Allen v. State, 321 S.E.2d 710 (Ga. 1984); State v. McKay, 680 S.W.2d 447 (Tenn. 1984); Selvage v. State, 680 S.W.2d 17 (Tex. Crim App. 1984); Kelly v. State, 669 S.D.2d 720 (Tex. Crim. App. 1984); State v. Wilson, 690 P.2d 755 (Ariz. 1984).

Continuing in this tradition, the Mississippi Supreme Court rejected a similar claim to that raised herein in Leatherwood v. State, 435 So. 2d. 645 (Miss. 1983). After reviewing the pertinent facts and discussing the holding in Enmund, the Court in the context of performing its mandatory proportionality review held:

> However, we find that the case sub judice does not fall within the holding of Enmund. Enmund did not participate in the actual robbery nor was he present when the murder was committed - he was waiting in the getaway car. Michael Leatherwood, like Enmund, participated in the planning of the crime. The difference is that Leatherwood was also present and involved i nthe execution of the robbery/ murder of Albert Taylor by throwing a rope over his head and pulling it tight with such force that the victim was jerked into the backseat. Leatherwood held the rope tight and told Tokman to "stab him" even as the victim was being subdued.

Though Leatherwood testtified he never believed the robbery would be carried out and certainly never intended to kill the victim, this Court cannot believe that one who attempts to strangle his victim into submission to the point of unconsciousness and tells his accomplice to "stab him" does not intend to or attempt to kill. The appellant's actions spoke louder than his words. Though Michael Leatherwood was not the "triggerman", he planned, schemed, and ultimatley physically subdued the victim by choking him with a rope, while another stabbed and bludgeoned the victim to death. These are hardly the facts upon which Enmund was decided by the United States Supreme Court and thus we find that the apellant's argument is not persuasive, and we find no merit in this assignment of error.

We have reviewed the record and compared it with all of our decisions subsequent to Jackson v. State, 337 So. 2d 1242 (Miss. 1976) involving the death penalty. Some have been affirmed and some reversed. After such comparison, we conclude that the death penalty here is not excessive

> in the light of the aggravating and mitigating circumstances. We further find tht the infliction of the death penalty on Michael Dale Leatherwood is not disproportionate, wanton or freakish when compared to cases involving similar crimes, the facts surrounding them and the defendants.
>
> Id., at 656.

See also: Williams v. State, supra; Irving v. State, 441 So. 2d 846 (Miss. 1983)

As respondent appropriate noted in his response to our Petition for Writ of Certiorari, Miss. Code Ann. § 99-19-101 (cum. supp. 1984) was out of an abundance of caution amended to require the jury to find one of the Enmund criteria before imposing a sentence of death. Being a recommended procedure, Newell v. State, 308 So. 2d 71 (Miss. 1975), the Mississippi Supreme Court has not felt constrained thereby and has continued to treat the matter as a question

of proportionality. See: Cabello v. State, ___So. 2d ___ (Miss. No. 55,581, May 1, 1985), Johnson v. State, _____ So. 2d __ (Miss. No. 55, 265, 1985) (No findings were made pursuant to the statute; however after reviewing the facts the Court found that Enmund was not applicable.)

E.

When renderd to its essential element, Enmund simply requires that the proof demonstrate a level of individual participation that justifies the application of the death penalty. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983); Drake v. Francis, 727 F.2d 990 (11th Cir. 1984); Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983) (Unit B); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984). To this end we find, the Eleventh Circuit's analysis of this issue in Ross v. Kemp, supra compelling:

We do not read Enmund as barring the death penalty for all non-triggermen, but merely as requiring a level of individual participation that justifies the application of the death penalty. 102 S. Ct. at 3377. The Supreme Court's objection in Enmund that Earl Enmund was to be executed "regardless of whether [he] intended or contemplated that life would be taken," id. at 3379, simply does not extend to appellant, whose actions undeniably reflect the contemplation that life would be taken. Appellant does not deny that he and Turner held the Stanford family hostage while their cohorts went to the Lee home. Likewise, it is undisputed that appellant was armed and in the dining room with Turner when Lieutenant Meredith entered the home. He was thus actively engaged in furthering the course of events that led directly to Meredith's murder, whether or not he actually pulled the trigger.

More fundamentally, it is evident that the two primary purposes of capital punishment - deterrence and retribution - legitimately can be applied to the facts of this case. The Enmund Court observed that the death penalty will not likely deter "if a person does not intend that life be taken or

contemplate that lethal force will be employed by others . . ." Id. at 3377. Here, however, it would be incredible to believe that appellant did not contemplate that lethal force would be used either by himself or his accomplice. Likewise, the "intentions, expectations, and actions," id. at 3378 of an individual engaging in such acts rise to a level of culpability such that the retributive purposes of capital punishment are furthered by appellant's sentence of death.

In sum, even if appellant's actions are viewed in their most favorable light, and even if we completely discount the testimony of those witnesses who stated that appellant had told them he thought he had shot a policeman, appellant's culpability still is of a magnitude wholly different from that of Earl Enmund. In Enmund, the evidence showed at most that the defendant had been seated in a getaway car at the side of the road awaiting the robbers' escape. In contrast, the record here depicts an individual who undoubtedly contemplated that lethal force would be used either by himself or by others as they hold a family hostage, and who actively participated in the activities that culminated in

> Lieutenant Meredith's death. Consequently, we find that the death penalty in this case does not violate the eighth amendment and we affirm the district court's denial of habeas corpus relief on this ground.
>
> Id., at 1489-90

The facts in this case as found by the Mississippi Supreme Court fully warrant a conclusion that respondent was present during and an active and willing participant in the homicide and robbery. Neither the Court of Appeals or the respondent has ever questioned, and frankly could never question, the adequacy of these findings at any point of these proceedings. The proof, therefore, clearly demonstrates that respondent's level of culpability was far greater than that credited to Enmund. Upon comparison to other cases involving a putative non-triggerman, the sentence

imposed is neither excessive or disproportionate. Cf., Johnson v. State, supra; Stringer v. State, 454 So. 2d 468 (Miss. 1984); Leatherwood v. State, supra; Reddix v. State, 381 So. 2d 999 (Miss. 1980); Bell v. State, 360 So. 2d 1206 (Miss. 1978). Accord: Brooks v. State, 599 S.W.2d 312 (Tex. Cr. App. 1979); Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982); Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978); Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978); Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977); Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977); Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976).

We therefore, suggest that the decision of the Court of Appeals is in error and that Solem v. Helm, supra, is dispositive.

2. The Court of Appeals Failed to Accord the Findings of the Mississippi Supreme Court the Presumption of Correctness Mandated By 28 U.S.C. § 2254(d).

Substantively speaking, 28 U.S.C. § 2254(d) requires federal courts in habeas corpus proceedings to accord a presumption of correctness to state courts findings of fact or explain why the presumption is not appplicable in view of the facts listed therein. Sumner v. Mata, 455 U.S. 391, 102 S. Ct. 1303, 71 L.Ed.2d 480 (1982). This presumption applied to factual determinations made by both state trial and appellate courts. Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L.Ed.2d 722, (1981). The high measure of deference to which a state court's factual findings are entitled requires that a federal court, considering

an application for habeas corpus, more than simply disagree with the state court before rejecting its factual determinations; instead, it must conclude that the state court's findings lacked even fair support in the record. Marshall v. Lonberger, 459 U.S. 422, 74 L.Ed.2d 646, 103 S. Ct. 843 (1983).

As noted previously, the Mississippi Supreme Court addressed the subject of respondent's culpability in the context of the Fourth Assignment of Eror and in performing its mandatory proportionality review finding on both occasions that Bullock was present during and an active and willing participant in the homicide and the robbery.

In similar fashion, in ruling on respondent's petition for writ of habeas corpus the District Court in pertinent part found:

> In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . ." 391 So. 2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.
>
> Pet. for Cert. at A29.

Numerous references were made to both the State Court and the District Court findings in response to respondent's appeal to the Fifth Circuit with references to § 2254(d) authority constituting one of the principal battlements.

Curiously, the Court in passing on the merits of the appeal completely ignored its ruling in denying the petition for rehearing in Reddix v. Thigpen, 732 F.2d 494

495 (5th Cir. 1984), to the effect that a factual finding by a State appellate court on the Enmund question are presumptively correct until rebutted. Wainwright v. Goode, ____U.S.____, 78 L.Ed.2d 187, 104 S. Ct. 378 (1984); Wainwright v. Witt, 469 U.S. _____, 83 L.Ed.2d 841, 105 S. Ct. (1985).

While the Mississippi Supreme Court's findings in the present matter are not couched in terms of the Enmund criteria, we submit that implicitly there is substantial compliance with the same. LaVallee v. Delle Rose, 410 U.S. 690, 35 L.#d.2d 637,93 S. Ct. 1203 (1973); Townsend v. Sain, 373 U.S. 293, 83 S. Ct.,745, 9 L.Ed.2d 770 (1963). In ruling on the issue, the Court noted that respondent challenged the finding that he intended to rob the victim and argued that he was an unwilling

participant in the robbery and homicide. Clearly, the question of respondent's personal culpability was before the Court. Equally as clear is the undisputed conclusion reached by the Court that:

> The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson . . .
>
> Bullock v. State, supra, at 606.

Therefore, considering the ruling in conjunction with the arguments advanced there can be but one conclusion; i.e., that Bullock actually participated in the killing and at lease contemplated that lethal force would be used.

## VII. CONCLUSION

For the foregoing reasons, singularly and collectively, petitioner's respectfully submit that the Court of Appeals erred and that the judgment of the District Court denying respondent's petition for writ of habeas corpus should be reinstated.

Respectfully submitted,

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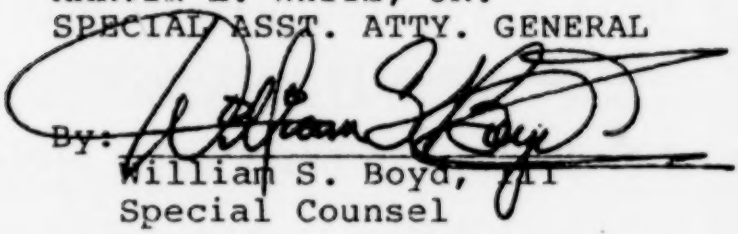
By: 
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Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1236

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

*Petitioners,*

—v.—

CRAWFORD BULLOCK, JR.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED FOR REVIEW

1. In a state where all capital sentencing findings must be made by the jury, may an individual convicted of felony murder be sentenced to death without any finding by the jury that he killed, attempted to kill, intended to kill, or contemplated that lethal force would be used?

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No. 84-1236

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

*Petitioners*,

—v.—

CRAWFORD BULLOCK, JR.,

*Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENT

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in the Brief for Petitioners, the following statutory provisions are involved, as set forth in the Appendix below.

1. MISS. CODE ANN. § 97-3-19 (since amended), HOMICIDE; MURDER DEFINED; CAPITAL MURDER.
2. MISS. CODE ANN. § 99-19-101 (since amended), JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

3. MISS. CODE ANN. § 99-19-101 (Cum. Supp. 1984), JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

4. MISS. CODE ANN. § 99-19-103 (Cum. Supp. 1984), INSTRUCTIONS; AGGRAVATING CIRCUMSTANCES SHALL BE DESIGNATED BY JURY IN WRITING; EFFECT OF JURY'S FAILURE TO AGREE ON PUNISHMENT.

## INTRODUCTION

Respondent, Crawford Bullock, Jr., was sentenced to death in 1979 under the Mississippi felony murder statute. Because he was indicted, tried, and convicted for aiding and abetting in a robbery in the course of which the victim was killed by another, Bullock's jury was not required to—and did not—find that he killed, attempted to kill, intended to kill or contemplated the use of lethal force. Bullock was convicted and sentenced to death under the Mississippi statutes identified by this Court in *Enmund v. Florida*, 458 U.S. 782 (1982), as among only eight state statutes authorizing the death sentence in felony murder cases without the finding of personal culpability mandated by the Eighth Amendment. *Id.* at 789 n.5. (Mississippi has since amended its capital sentencing statute to cure the defect that allowed Bullock to be sentenced to death in violation of *Enmund*. *See* Miss. Code Ann. § 99-19-101 (Cum. Supp. 1984) (5a)[1].)

The Court of Appeals for the Fifth Circuit vacated Bullock's death sentence because of the failure of the State of Mississippi to comply with the constitutional requirements of *Enmund*. That decision should be affirmed.

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1 References in this form are to the Appendix at the end of this brief. References preceded by "TR" are to the trial transcript. References preceded by "HC" are to the federal habeas corpus transcript. References preceded by "A" are to the Appendix to the petition for certiorari. References preceded by "JA" are to the Joint Appendix.

## STATEMENT OF THE CASE

### A. The Respondent

At the time of the crime, respondent, Crawford Bullock, Jr., a white male, was 21 years old. Bullock was employed, and had received an honorable discharge from the Marines. He had a personal and family history of mental illness and alcohol and drug abuse, and a minor criminal record, which did not include any felonies or crimes of violence.[2]

Bullock was born in July 1957, and grew up in and around Jackson, Mississippi. (TR 1339-40, 1343) His childhood was marred by a mentally ill mother who abused alcohol and drugs, who attempted suicide on several occasions, and who was repeatedly institutionalized in a state facility for the mentally ill. (TR 5-6, 1340; HC 147-8, 227) Bullock, his uncle, and his sister also attempted suicide at some time in their lives. (TR 5-6) Bullock's parents were divorced when he was 16 years old. (HC 147)

Bullock dropped out of school after the eighth grade (TR 1339), and he enlisted in the Marines in July 1974, shortly after his seventeenth birthday. (TR 1341, 1351) Bullock obtained his high school equivalency diploma in the Marines, and was awarded several citations, including a meritorious mast for outstanding duty, a national defense service medal and a rifle expert badge. (TR 1341, 1344-45, 1351) An injury cut short Bullock's military career, and he received an honorable medical discharge in April 1976. (TR 1343, 1351) Returning to civilian life, Bullock held a series of jobs, and contributed to the support of his sister. (TR 1344)

Bullock has had problems with alcohol and drug abuse, for which he has been hospitalized on several occasions. (TR 6, 181-82) He also has had psychiatric problems, and has been diagnosed as suffering from "poly-drug abuse and habitual

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2 Bullock's record consisted of misdemeanor convictions for possession of marijuana, resisting arrest, petty larceny, possession of a stolen automobile tag, a traffic violation and trespassing. (TR 1342)

excessive alcohol abuse, as well as a probable underlying personality disorder." (TR 181-82) He has been diagnosed as psychotic. (TR 1056)[3]

## B. The Crime[4]

In late September 1978, Bullock was on temporary disability leave from his job at American Cyanamid, as the result of a broken ankle received in a motorcycle accident. (TR 1091-92) His left leg was in a knee-high plaster cast. (TR 1086, 1092) On Thursday, September 21, Bullock, who had just received a disability check, asked a friend to take him to the Town Creek Saloon, a bar in Jackson. (TR 1091-93) One of the people who accompanied them to the bar was Ricky Tucker.[5] (TR 1093)

Bullock consumed both alcohol and drugs during the course of the evening. (TR 565-66, 1046, 1227) When he left the bar at about 1:30 a.m., he realized that the person who had driven him to the bar had gone without him. (TR 1095-96) He waited in the parking lot to see if someone else he knew would drive him home. (TR 1097) He was joined there by Tucker, who had also been drinking and taking drugs, and who had been in a fight at the bar earlier in the evening. Tucker had also been left without a ride home. (TR 1046, 1096-97)

At that point, Mark Dickson left the bar. Dickson had himself been engaged in an evening of drinking, having spent

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3 Bullock was unable to adequately develop the degree of his mental problems for use in his defense. His motion for funds to employ a psychiatrist was denied, which led his counsel to answer "not ready" for trial. (TR 175-80)

4 Petitioners purport to set forth the substantive facts "as found by the Mississippi Supreme Court," Pet. Brief at 8, but do not do so. As noted below, at several points in their statement of facts petitioners depart from the record, the factual recitation of the Mississippi Supreme Court, and the factual statement of every other court that has reviewed this case, and simply invent "facts" favorable to their theory of the case.

5 Although it is undisputed that Tucker was the "triggerman" in the murder for which Bullock was sentenced to death, in a separate trial he received a life sentence. (HC 135-36)

the earlier part of the evening at another bar with some friends, and then having come to the Town Creek Saloon by himself. (TR 747-48, 761) Bullock and Dickson knew each other vaguely (TR 1046); Tucker and Dickson apparently had had drug dealings. (TR 1105, 1170)

Dickson offered Tucker and Bullock rides to their homes. Because of the cast on Bullock's leg, he sat in the front seat of the car; Tucker sat in the back. (TR 1097) The three young men continued drinking as they passed around one of several bottles of whiskey that were in Dickson's car. (TR 716, 1098)[6]

During the ride, Bullock asked Dickson to stop at a store so he could buy a loaf of bread. Dickson did so and loaned him 35 cents to make the purchase. The store was out of bread, and Bullock returned the change to Dickson. (TR 1099-1100) Later in the ride, Bullock asked Dickson to stop so that he could relieve himself, and Dickson did so. (TR 1101) As Bullock was returning to the car, he heard Tucker and Dickson arguing about a drug sale that Tucker had previously made to Dickson for which Dickson had apparently not yet paid Tucker. Bullock testified:

> When I was coming back from the woods, I heard Ricky [Tucker] saying something about—he said: "Look, you got the drugs. Now give me my money" or something like that.
>
> . . . .
>
> Mark [Dickson] said: "I don't have any money to pay you with" . . . .

(TR 1105)[7]

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6 The bottle had been full earlier in the evening (TR 716-17), but Dickson apparently had already consumed one-quarter of it before he offered Tucker and Bullock the ride home. (TR 1098)

7 In describing this exchange, petitioners claim: "Dickson was thereupon heard to reply that he did not have any money but that they, Bullock and Tucker, could have the automobile." Pet. Brief at 10. In fact, Bullock's uncontradicted testimony was that "Mark said that Ricky could have the car

*(Footnote continued on following page)*

The ride resumed, but Dickson missed the turn to Tucker's home. (TR 1107) Tucker and Dickson began to argue about whose fault it was that the turn had been missed. (TR 1108) The argument escalated to the point where Dickson stopped the car and challenged Tucker to fight. Bullock testified:

> They kept up and kept up yelling at each other. Mark [Dickson] said—he just stated: "I'll just stop this car and whip your ass."
>
> . . . .
>
> Ricky [Tucker] said: "Go ahead."

(TR 1108)[8] Dickson began swinging at Tucker, who was trapped in the back seat of the two-door car. (TR 1109) Tucker yelled for Bullock to grab Dickson, and he did so in an effort to stop the fight. (TR 1109)

Dickson left the car to continue his fight with Tucker. Bullock testified:

> Mark [Dickson] opened the door. He pulled his arm away from me and got out of the car and he told Ricky [Tucker] to crawl his ass out of the car and let's get it on.

(TR 1109) Tucker then emerged from the car holding a whiskey bottle, and Dickson took flight with Tucker in close pursuit. (TR 1109) Tucker caught up with Dickson about 50 to 70 yards from the car, and tackled him. The fight between Dickson and Tucker continued, with Bullock still in the car. (TR 1109-10)

Bullock climbed out of the car and proceeded towards the fight, his progress slowed by the cast on his leg. (TR 1110) When he reached Tucker and Dickson, the fight between the two was even. (TR 1110) Bullock intervened in an attempt to break up the fight, first grabbing Tucker and then Dickson.

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*(Footnote continued from previous page)*

if he wanted it." (TR 1106) Bullock's statement reads: "I then saw Mark take his billfold out and show it to Ricky and he said 'I don't have any money but you can take the car.' " (TR 1031)

8 Petitioners' statement that "Dickson, apparently fearing injury, as rightly he should have been, stopped [the car]," Pet. Brief at 11, is another misstatement of the record.

(TR 1110, 1121, 1180)[9] While Bullock was between Tucker and Dickson and holding Dickson back, Tucker swung the whiskey bottle over Bullock at Dickson. However, Tucker's swing hit Bullock on the right hand,[10] shattering the bottle and opening a deep gash on Bullock's hand. (TR 1110)[11] Bullock's hand immediately began to bleed profusely, and he backed away from the fight. (TR 1110)

The fight between Tucker and Dickson continued, without any involvement by Bullock. (TR 1111) Indeed, while Tucker was beating Dickson, Bullock attempted to start some cars at a nearby garage in an effort to get away from the fight. (TR 1111-12) Tucker eventually gained the upper hand and knocked Dickson down. (TR 1111) He then jumped up and down on Dickson's head. (TR 1111) Bullock yelled for Tucker to stop, but Tucker ignored him. (TR 1111) Tucker then beat Dickson with a heavy concrete block, repeatedly throwing the block (which weighed over 40 pounds (HC 338-39)) onto Dickson's head, yelling each time he threw the block down. (TR 1111) Death was caused by the blows struck by Tucker with the

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9 Petitioners again misstate the record, claiming that when Bullock came to where Tucker and Dickson were fighting, "Tucker instructed Bullock to grab Dickson which he did. . . ." Pet. Brief at 10. There is no evidence in the record for this allegation, and the factual recitations of the Mississippi Supreme Court, the district court and the Fifth Circuit do not contain this alleged instruction by Tucker. The record is fully consistent with Bullock's testimony that he grabbed Dickson to break up the fight. (TR 1110, 1121, 1180)

10 Petitioners' statement that Tucker struck Dickson "several times in the head" with the bottle while Bullock was holding him and that Bullock's hand was cut some time "[d]uring this rain of blows" with the whiskey bottle, Pet. Brief at 10-11, is another of petitioners' inventions. There was only a single blow with the bottle, which broke on Bullock's hand. This is clear from the record (TR 1110), and from the factual recitations of the Mississippi Supreme Court (A71), the district court (A25), and the Fifth Circuit (A9). Again, the record is fully consistent with Bullock's testimony that he grabbed Dickson to break up the fight and was injured by the first—and only—blow with the bottle, which came from behind him. (TR 1110)

11 The injury to Bullock's hand was so severe that he was later hospitalized for a week. (TR 1060)

concrete block. (TR 930-34, 956-58) Tucker, "berserk" with rage, then beat Dickson's lifeless body with a wooden board. (TR 1111-12)

Bullock's minimal involvement in the drunken brawl between Dickson and Tucker ended when his hand was cut. That injury occurred very early in the fight while Dickson and Tucker were still even. (TR 1110-12) The trails of Bullock's blood corroborate his testimony that he backed away from the fatal fight between Tucker and Dickson at an early stage. Bullock's blood was found at various places: in a trail some 50 yards along the street where the fight took place (TR 487); on the cars he tried to start to get away from the fight between Tucker and Dickson (TR 481); on his blood-soaked shirt (TR 415, 978); and on the boat at the lake where Dickson's body was later hidden. (TR 1015, 1476) None of Bullock's blood was found on the concrete block with which Tucker killed Dickson, or on Dickson's body. (TR 966-85, 1474-86)

After Tucker killed Dickson, Tucker and Bullock jointly disposed of the body. Bullock testified that he did so out of fear of Tucker, and because he was shocked and confused about what had happened. (TR 1112-13, 1126)

Bullock was arrested two days later on his way back from the hospital where he had received additional treatment for the injury to his hand (he had had it stitched the night of the incident (TR 1127)). (TR 1130-31) He was held at the police station for over nine hours, after which time he made a statement. (TR 592, 599) No lawyer was present.

### C. The Indictment and Trial

Bullock was indicted, tried, convicted and sentenced to death on the theory that he aided and abetted in a robbery in the course of which the victim was killed by someone else (in this case, Tucker).[12] He was indicted under the Mississippi

12 As Judge Garwood wrote, concurring in the decision below:

> [I]t appears that the entire case was essentially tried on the theory, in full accordance with the then law of Mississippi, that it was not necessary, either for the felony murder conviction or for the sentence

*(Footnote continued on following page)*

capital felony murder statute, Miss. Code Ann. § 97-3-19(2)(e) (since amended), which provided:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (e) When done *with or without any design to effect death, by any person* engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(1a-2a) (emphasis added).[13] Consistent with the statute, Bullock's indictment made no reference to malice aforethought or intent to kill. (TR 2)[14]

Bullock and Tucker were tried separately and were represented by different counsel. Bullock's prosecution was based on the theory that he aided and abetted Tucker in the robbery of Dickson. The prosecution repeatedly objected to any suggestion that the state had to prove that Bullock killed Dickson. Thus, during the jury selection, when Bullock's attorney stated:

> [t]his charge being capital murder, the State has to prove to you beyond a reasonable doubt that Crawford Bullock, Jr. was in the process—he either did rob or was attempt-

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*(Footnote continued from previous page)*

> to death, to find that Bullock had either the intent to kill or any personal participation in the killing. It is not unreasonable to infer that Bullock's jury may have reached the result it did despite concluding both that Bullock had no design to effect death and that the affray reached the level of being potentially fatal to Dickson only well after Bullock had backed away and ceased any personal participation in it.

*Bullock v. Lucas*, 743 F.2d 244, 248 (5th Cir. 1984) (Garwood, J., concurring) (A 19).

13 Under Mississippi law, any person aiding and abetting in the underlying felony can be found guilty of capital felony murder. *See, e.g., Reddix v. State*, 381 So. 2d 999, 1012 (Miss.), *cert. denied*, 449 U.S. 986 (1980); *Price v. State*, 362 So. 2d 204, 205 (Miss. 1978).

14 The state's proposed jury instruction on murder as a lesser included offense was rejected by the trial court precisely because no malice aforethought was alleged in the indictment. (TR 1243-45)

> ing to rob Mark Dickson—and that in doing so, he killed Mark Dickson,

the prosecutor objected:

> To which we object, Your Honor. That's not a proper statement of the law.

(TR 333)[15] And, during closing argument, the following exchange took place:

> [Defense counsel]: All you've got to do [to acquit] is not to be able to prove that he killed him or that he robbed him.
>
> [Prosecutor]: May it please the Court, that's exactly the reason I objected to that instruction and I object to him stating that to the jury. *We do not have to prove that he killed this man or robbed him. All we have to show is that he aided or abetted* and we object to that.
>
> [The Court]: You will have an opportunity to argue, Mr. Peters [the prosecutor]. . . .

(TR 1310) (emphasis added).

In accordance with the indictment, the capital felony murder statute, and the state's theory of the case, the jury instructions did not require the jury to find that Bullock killed, attempted to kill, intended to kill, or contemplated that lethal force would be used.[16]

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15 The court responded by reminding the jury that it would be instructed on the law at the end of the trial. (TR 333)

16 The jury instructions on capital murder were Instructions 15 and 16, delivered during the guilt phase of the trial. Instruction 15, in its entirety, read:

> The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on September 21, 1978, in the First Judicial District of Hinds County, Mississippi, Crawford Bullock, Jr., was present, consented to, and encouraged the commission of a crime and thereby aided another individual, and that he, the said Crawford Bullock, Jr. or the other, then and there did wilfully, unlawfully and feloniously take and carry away the personal property of another from the presence of Mark Dickson, and from his person,

*(Footnote continued on following page)*

The trial commenced on Tuesday, May 22, 1979. The guilt phase of the trial was concluded 8:10 p.m. on Friday, May 25, 1979, when the jury returned a verdict of guilty. (TR 149, 1435,

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*(Footnote continued from previous page)*

> against his will, by violence to his person, to-wit his billfold or one 1976 Thunderbird automobile then in his possession, then and in that event, the Defendant, Crawford Bullock, Jr., is guilty of robbery as if he had with his own hands committed the whole offense; and, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or *while acting in concert with another*, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, *whether done with or without any design to effect the death* of the said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder, and the form of your verdict should be in the following form, written on a separate sheet of paper:
>
> "We, the Jury, find the Defendant, Crawford Bullock, Jr., guilty of Capital Murder."

(TR 1418-19; JA 87-89) (emphasis added) Instruction 16, in its entirety, read:

> The Court instructs the Jury that in order to find the Defendant guilty of capital murder you must be convinced beyond a reasonable doubt from the evidence that the Defendant is guilty of each of the following:
>
> 1. That Crawford Bullock, Jr. did feloniously take or attempt to feloniously take the personal property of Mark Dickson, in his presence or from his person and against his will by violence to his person or by putting Mark Dickson in fear of some immediate injury to his person and
>
> 2. That in doing so, Crawford Bullock, Jr., did in fact kill Mark Dickson *without malice*, without authority of law, and not in necessary self defense.
>
> The Court further instructs you that if the State fails to prove to you any one of the above, beyond a reasonable doubt, then it is your sworn duty to find the Defendant, "Not Guilty."

(TR 1420; JA 90-91) (emphasis added) These instructions did not require the jury to find that Bullock killed, attempted to kill, intended to kill, or contemplated the use of lethal force. *See infra* at 33-36.

The instructions given to the jury at the sentencing phase (TR 1424-34; JA 97-112) contained no language whatsoever requiring the jury to find that Bullock killed, attempted to kill, intended to kill, or contemplated that lethal force would be used.

1488) Bullock's attorney requested a recess until the next morning so that he could properly prepare for the sentencing phase, but the trial judge refused. (TR 1337-38) As a result, at least one of the witnesses the defense had planned to call was unavailable. (HC 56)[17] The entire sentencing phase took only about one hour (TR 1488-89), after which the jury deliberated for approximately two hours before returning a verdict of death at about 11:40 p.m. (TR 1377-78, 1489) The jury found two aggravating circumstances,[18] and found that the mitigating circumstances did not outweigh the aggravating circumstances. (TR 1377-78, 1436) It is not clear which mitigating circumstances the jury may have found, as the verdict form did not include any space for these to be listed. (TR 1426)

Tucker, who did not plead guilty, was tried separately and was also convicted of capital felony murder, but was sentenced to life imprisonment. (HC 135-36)

### D. Appellate Proceedings

On direct appeal, the Mississippi Supreme Court affirmed Bullock's conviction and death sentence. In affirming the sentence, the court expressly relied on accomplice liability consistent with the theory of the statute, the indictment, the prosecution and the jury instructions:

> The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender.

*Bullock v. State*, 391 So. 2d 601, 614 (Miss. 1980) (citations omitted) (A 116).

This Court denied Bullock's petition for a writ of certiorari. *Bullock v. Mississippi*, 452 U.S. 931 (1981).

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17 Even though it denied habeas corpus relief, the district court stated: "I would be more comfortable if [the trial judge] had waited and started that [sentencing] phase the next morning though." The state agreed, although it argued that no prejudice resulted. (HC 244)

18 (1) That the capital murder was committed while the defendant, either alone or with another, was engaged in the commission of robbery; and (2) that the capital murder was especially heinous, atrocious or cruel. (TR 1377, 1436)

### E. Collateral Review

Bullock commenced state and federal collateral proceedings. The Mississippi Supreme Court denied Bullock leave to file a writ of error *coram nobis*, without opinion. By agreement of the parties, the federal habeas corpus proceeding was heard by a Magistrate, who denied the writ, but issued a certificate of probable cause authorizing appeal. *See* Order and Judgment dated September 14, 1983.

The Court of Appeals for the Fifth Circuit vacated Bullock's death sentence on the basis of this Court's decision in *Enmund*:

> [T]he instructions to the jury permitted the death sentence without a specific finding that Bullock either killed, attempted to kill or intended a killing or the use of lethal force.

*Bullock v. Lucas*, 743 F.2d 240, 247 (5th Cir. 1984) (A 12-13). The conviction, which Bullock did not challenge, was left undisturbed.

This Court granted the state's petition for a writ of certiorari. *Cabana v. Bullock*, 105 S. Ct. 2110 (1985).

## SUMMARY OF THE ARGUMENT

In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court held that the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on a person who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used. This case raises the question—not addressed in *Enmund*—of who must make the findings required by *Enmund* before the death sentence may be imposed. (Point I)

As a matter of due process, the *Enmund* findings must be made by the jury. (Point II) The *Enmund* findings are constitutionally required elements of a death sentence for felony murder—they distinguish those individuals convicted of felony murder who are "death eligible" from those who are not. Consequently, due process requires that the *Enmund* findings must be made by the jury, just as it requires that all elements of

a crime must be found by the jury. Since elements of a crime specified by state law must be found by the jury, *a fortiori*, elements required by the Constitution—such as the *Enmund* factors—must be found by the jury. (Point IIA)

Even if due process did not universally require the *Enmund* findings to be made by the jury, it would require them to be made by the jury in those states, like Mississippi, where state law requires that all capital sentencing findings must be made by the jury. This feature of Mississippi law creates a constitutionally protected liberty interest as a result of which defendants tried for capital murder in Mississippi, including Bullock, have a due process right to have the *Enmund* findings made by the jury. (Point IIB)

Bullock's jury was not required to make any *Enmund* findings. *Francis v. Franklin*, 105 S. Ct. 1965 (1985), and an unbroken line of precedent establish that the instructions given to Bullock's jury were fatally defective. Indeed, petitioners do not argue to the contrary. Consequently, Bullock's death sentence was properly vacated. (Point IIC)

Petitioners' argument that the *Enmund* findings can be made by a state appellate court because *Enmund* was a proportionality decision fundamentally confuses the role of this Court in interpreting the Eighth Amendment with the role of the jury in making factual findings in a specific case. This Court determines which crimes may constitutionally be punished by death; a jury determines whether a particular defendant committed one of those crimes. Petitioners' assertion that in making *Enmund* findings a state appellate court would be doing no more than this Court did in *Enmund* is obviously erroneous, as this Court made no factual findings in *Enmund*. A state appellate court making *Enmund* findings in the first instance would be impermissibly attempting to supply constitutionally required findings that the jury had not made. Far from sanctioning such a procedure in *Enmund*, this Court has consistently held that due process is violated when an appellate court attempts to provide findings omitted by the jury. (Point IID)

Assuming *arguendo* that due process does not require the jury to make the *Enmund* findings, at the very least it requires that those findings be made at the trial level; they cannot be supplied by an appellate court. Since neither Bullock's jury nor his trial judge made any *Enmund* findings at either the guilt or sentencing phase, his death sentence was properly vacated even if the *Enmund* findings could be made by either the jury or trial judge. (Point III)

Moreover, even if petitioners were correct in asserting that the *Enmund* findings could be supplied by a state appellate court, the judgment below should nevertheless be affirmed. The opinion of the Mississippi Supreme Court cannot be construed as containing any *Enmund* findings. That court did not consider itself to be making *Enmund* findings (its decision predated *Enmund*), and its statement of the case and discussion do not contain any unambiguous findings of any of the *Enmund* factors. Rather, consistent with the indictment, the Mississippi felony murder statute, the prosecution and the jury instructions, the Mississippi Supreme Court's analysis rests squarely on the theory of accomplice liability which *Enmund* holds cannot constitutionally support a death sentence. (Point IV)

## ARGUMENT

### I

### *ENMUND v. FLORIDA* PROHIBITS THE IMPOSITION OF A DEATH SENTENCE ON AN INDIVIDUAL WHO DID NOT KILL, ATTEMPT TO KILL, INTEND TO KILL, OR CONTEMPLATE THAT LETHAL FORCE WOULD BE USED.

In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court held that the Eighth and Fourteenth Amendments prohibit the execution of an individual who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used.[19]

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19 *Enmund* did not hold that any one of these elements alone is sufficient to support a death sentence; rather, it held that where none is present the death penalty is unconstitutional. Because Bullock's jury did not make any of the *Enmund* findings, the Court need not decide whether any particular factor is necessary or whether each is sufficient.

Enmund was the getaway car driver in a robbery during which other persons committed murder. The Court held that the Eighth Amendment required that

> [f]or the purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

*Id.* at 801.

In reaching this conclusion, the Court noted that legislatures and jurors had regularly rejected the imposition of the death penalty on individuals who had not killed, attempted to kill, intended to kill, or contemplated the use of lethal force. *Id.* at 789-96. Specifically, the Court noted that only eight states allowed the imposition of the death penalty "solely because the defendant somehow participated in a robbery in the course of which a murder was committed." *Id.* at 792.[20] One of the eight was Mississippi; presaging this case, the Court singled out the statute under which Bullock was sentenced to death as one authorizing an unconstitutional death sentence. *Id.* at 789 n.5.[21]

This case presents the question of who must find that at least one of the *Enmund* factors is present before the death penalty may be imposed.[22] Because of the procedural posture in which

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20 The Court identified another nine states where there was some possibility of a defendant being sentenced to death without a finding that he killed, attempted to kill, intended to kill or contemplated the use of lethal force. *Id.* at 791-92 & nn.12-13.

21 Since the 1982 decision in *Enmund*, several of the 17 states that conceivably allowed death sentences in violation of *Enmund*, including Mississippi, have corrected the constitutional deficiencies in their capital sentencing schemes by statutory amendment or judicial decision requiring that *Enmund* findings be made before the death sentence can be imposed. *See infra* at 23-27.

22 Although petitioners previously argued that *Enmund* simply set forth a geographic proximity test—*i.e.*, that it barred the death penalty only where the defendant was not physically present at the scene of the murder—they have now abandoned that argument. In any event, it is clear that *Enmund* does more than simply announce a "tape measure" rule barring the

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*Enmund* came before the Court, the issue of who must make the required findings was not addressed there.[23] In *Enmund*, the Florida Supreme Court reversed factual findings as to Enmund's personal involvement that had been made by the trial court, and held that Enmund had not killed, attempted to kill, intended to kill, or contemplated that lethal force would be used. Consequently, this Court was not faced with—and did not address—the question of who must find that the *Enmund* factors are present to allow imposition of the death sentence.

Respondent contends that the *Enmund* findings must be made by the jury. Petitioners argue that the *Enmund* findings can be made by a state appellate court reviewing the trial record.[24] Petitioners do not argue that the *Enmund* findings can be supplied by a federal court on collateral review.

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death penalty only when the defendant was more than a certain distance from the scene of the crime. Also abandoned by petitioners is their argument that *Enmund* should not be applied retroactively. That argument is also without merit. *See Jones v. Thigpen*, 741 F.2d 805, 810-11 (5th Cir. 1984), *petition for certiorari pending* (describing state's argument that *Enmund* applies only prospectively as "patent[ly] frivolous[ ]"); *see also Eberheart v. Georgia*, 433 U.S. 917 (1977); *Stewart v. Massachusetts*, 408 U.S. 845 (1972) (per curiam).

23 Petitioners' claim that *Enmund* supports their position (Pet. Brief at 54) is unfounded. *Enmund* simply does not address the question of who must make the required findings before the death penalty may be imposed.

24 There is a split in the circuits, with the Fifth Circuit supporting respondent's position and the Eleventh Circuit supporting petitioners'. *Compare, e.g., Reddix v. Thigpen*, 728 F.2d 705 (5th Cir.), *cert. denied*, 105 S. Ct. 397 (1984) *with, e.g., Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985) (en banc). The other circuits have not clearly expressed a view on this question, although the Tenth Circuit appears to have followed the Fifth Circuit's approach in *Chaney v. Brown*, 730 F.2d 1334, 1356 n.29 (10th Cir.), *cert. denied*, 105 S. Ct. 601 (1984) (death penalty vacated on other grounds; in addressing the *Enmund* challenge the court stated: "In any further sentencing proceedings, careful *jury instructions* must explain the essential elements required by *Enmund* before a death sentence can be imposed." (emphasis added)) and the Fourth Circuit may have followed the Eleventh Circuit's approach in *Roach v. Martin*, 757 F.2d 1463, 1482-83 (4th Cir. 1985).

## II

## BULLOCK'S DEATH SENTENCE WAS PROPERLY VACATED BECAUSE HIS JURY WAS NOT REQUIRED TO MAKE ANY *ENMUND* FINDINGS.

### A. Due Process Requires That The *Enmund* Findings Be Made By The Jury.[25,26]

It is a fundamental tenet of due process that a criminal defendant can be convicted only if a jury finds that he is guilty of all elements of the crime with which he has been charged. *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The requirement that all elements of a crime must be found by a jury is a result of the "fundamental" role of trial by jury in our criminal justice system. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under

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25 Because there is a factual dispute about whether any of the *Enmund* factors are present in this case, the Court need not decide if there should be an exception to the requirement that the *Enmund* findings must be made by the jury in cases where such findings are "undisputed." *Francois v. Wainwright*, 105 S. Ct. 2668, 2669 (1985) (Brennan, J., dissenting from denial of certiorari). A number of the Eleventh Circuit's cases affirming death sentences where the jury did not make *Enmund* findings fall into the category of murders by a single defendant acting without an accomplice where it is undisputed that one or more of the *Enmund* factors were present. *See, e.g., Henry v. Wainwright*, 721 F.2d 990 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2374 (1984).

26 Since the *Enmund* findings have to be made by the jury, petitioners' second argument —that there was insufficient deference to the findings of the Mississippi Supreme Court—is irrelevant. Nothing in the Mississippi Supreme Court's opinion even remotely suggests that Bullock's jury made an *Enmund* finding. There is no state court finding on the relevant issue to which a federal court should defer.

> the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

*Id.* at 155-56. It is for this reason that "a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947) (footnote omitted); *see also Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979); *Sparf v. United States*, 156 U.S. 51, 105-06 (1895).

Thus, due process requires that all elements of a crime must be found by the jury. Elements of a crime are defined by state law. In contrast, the *Enmund* findings are *constitutionally* required components of a crime for which a person may be executed. Consequently, the *Enmund* findings have a constitutional significance at least equivalent to statutory elements of the crime of capital felony murder. Since due process mandates that elements of the crime required by state law must be found by the jury, *a fortiori*, the constitutionally required *Enmund* factors must be found by the jury.

The status of the *Enmund* findings as at least the constitutional equivalent of elements of an offense is apparent from a comparison of their role in the capital sentencing process to the role of aggravating or mitigating circumstances. The Eighth Amendment places constitutional limits on which crimes may be punished by death. It is up to the states to devise a statutory scheme that guides the sentencer's discretion in determining who among the constitutionally "death eligible" defendants will actually be sentenced to death.[27] This channeling function is primarily accomplished by the consideration of aggravating and mitigating circumstances defined by state law. The purpose of statutory aggravating and mitigating circumstances is to "guide[ ] and channel[ ]" the sentencer in exercising its discretion in choosing who among those eligible for the death

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27 This Court has struck down both statutes allowing the sentencer unbridled discretion in sentencing defendants to death, *see, e.g., Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), and mandatory death penalty statutes. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam).

sentence will actually be sentenced to death, *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (Stewart, Powell and Stevens, JJ.), or to "genuinely narrow the class of persons eligible for the death penalty and . . . [to] justify the imposition of a more severe penalty on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (footnote omitted); *see also Spaziano v. Florida*, 104 S. Ct. 3154, 3162-63 (1984); *Barclay v. Florida*, 463 U.S. 939, 962-63 (1983) (Stevens and Powell, JJ., concurring); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 221-22 (1976) (White, J., Burger, C.J. and Rehnquist, J., concurring).

Because the purpose of weighing aggravating and mitigating circumstances is to select among those for whom the death penalty is a constitutionally permissible punishment, this Court has not accorded constitutional significance to particular aggravating or mitigating circumstances. Thus, no particular aggravating circumstances are constitutionally required before the death penalty may be imposed, no particular mitigating circumstances preclude its imposition, and reliance, in part, on non-statutory aggravating circumstances does not invalidate a death sentence. *See Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983). As the Court stated in *California v. Ramos*, 463 U.S. 992 (1983):

> In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.

*Id.* at 999 (emphasis in original); *cf. Zant v. Stephens*, 462 U.S. 862, 890 (1983) ("the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances").

Consequently, aggravating and mitigating circumstances may generally be found by the trial court as well as the jury. *Spaziano v. Florida*, 104 S. Ct. 3154 (1984).

By contrast, the *Enmund* factors are constitutionally required before the death penalty may be considered as a sentence to be imposed. They are not used to further narrow the class of defendants for whom death is a permissible punishment, nor are they guides to help the sentencer exercise its discretion. Rather, the *Enmund* factors come in at an earlier stage of the analysis: they define which crimes can—and which cannot—constitutionally be punished by death; they determine "death eligibility," rather than simply aiding in the choice of which of the "death eligible" defendants will be executed. Particular aggravating and mitigating circumstances are not constitutionally required; the *Enmund* factors are. As a result of *Enmund*, certain "crimes formerly punishable by death no longer are or can be." *Tennessee v. Garner*, 105 S. Ct. 1694, 1703 (1985).

*Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), held that the death penalty may not be constitutionally imposed on a defendant for the crime of rape. Similarly, *Enmund* held that the death penalty may not constitutionally be imposed on a defendant who did not kill, attempt to kill, intend to kill, or contemplate the use of lethal force. It is beyond dispute that only a jury can find that an individual committed murder rather than rape. *See Cole v. Arkansas*, 333 U.S. 196 (1948) (violation of due process for appellate court to affirm prison sentence based on finding that defendant committed a crime the jury had not convicted him of); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam) (violation of due process for appellate court to affirm death penalty based on finding of an aggravating circumstance that had not been found by the jury). So too, only a jury can find that an individual committed the type of felony murder for which death is a constitutionally valid punishment (*i.e.*, one where the *Enmund* factors are present), rather than a felony murder for which the death

penalty may not be imposed under *Enmund*.[28] *Cf. Coker v. Georgia*, 433 U.S. 584, 602 n.1 (1977) (Powell, J., concurring in part and dissenting in part) (arguing that the death penalty should be available for certain forms of aggravated rape, with the jury to make the determination of which form of rape the defendant is guilty of: "the jury system is designed and operates successfully to resolve precisely this type of factual issue").

This Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), further supports the conclusion that the *Enmund* factors are constitutionally equivalent to elements of an offense for purposes of the due process requirement that all elements of an offense must be found by the jury. In *Mullaney*, the state argued that elements of the crime which must be found by the jury included only "those facts which, if not proved, would wholly exonerate the defendant." *Id.* at 697. The Court rejected that argument.

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28 This conclusion is especially compelling given the death penalty's unique nature, which has been consistently recognized by this Court:

> [E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

*Spaziano v. Florida*, 104 S. Ct. 3154, 3167 & n.2 (1984) (Stevens, Brennan and Marshall, JJ., concurring in part and dissenting in part) (collecting cases); *see also California v. Ramos*, 463 U.S. 992, 998-99 & n.9 (1983) (collecting cases). If only a jury can determine which of the varying degrees of robbery or non-capital murder a defendant is guilty of, where the only difference is the length of the prison term, *a fortiori*, only the jury can determine whether the defendant is guilty of capital felony murder or non-capital felony murder under *Enmund*, where the difference is death versus a prison term.

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).

> This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . .
>
> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

*Id.* at 697-98.

Similarly, the *Enmund* findings distinguish between those who are subject to the death penalty and those who are subject only to lesser penalties. This distinction "may be of greater importance than the difference between guilt or innocence for many lesser crimes," *Mullaney*, 421 U.S. at 698, for "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Consequently, due process requires that the *Enmund* findings be made by the jury.

Since *Enmund*, several of the states that did not previously require *Enmund* findings before imposing the death sentence have corrected the constitutional defects in their capital sentencing schemes. In 1983, Mississippi added a provision to its capital sentencing statute explicitly requiring an *Enmund* finding by the jury before the death penalty may be imposed. Miss. Code Ann. § 99-19-101(7) (Cum. Supp. 1984).[29] Bullock is a

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29 The 1983 amendment to the Mississippi capital sentencing statute added the following language:

*(Footnote continued from previous page)*

victim of the fact that his trial occurred during the narrow window of unconstitutionality in the Mississippi capital sentencing scheme. If Bullock were sentenced today, he would not be subject to the statute that authorized his execution in violation of *Enmund*.

Other states have corrected the constitutional defects in their capital sentencing schemes by judicial action. In *State v. Stokes*, 308 N. Car. 634, 304 S.E.2d 184 (1983), the North Carolina Supreme Court reversed a death penalty because the jury had not made any of the *Enmund* findings, even though "there was strong evidence that defendant himself . . . delivered the fatal blows." *Id.* at 649, 304 S.E.2d at 194. The court set forth new procedures that are "necessary when the *Enmund* question is presented":

> [A]t the . . . sentencing hearing and before the sentencing jury begins its consideration of aggravating and mitigating circumstances toward returning its recommendation as to punishment, the trial judge should submit to and the jury answer issues as follows:

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*(Footnote continued from previous page)*

> (7) In order to return and impose a sentence of death *the jury must* make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
>
> (b) The defendant attempted to kill;
>
> (c) The defendant intended that a killing take place;
>
> (d) The defendant contemplated that lethal force would be employed.

Miss. Code Ann. § 99-19-101(7) (Cum. Supp. 1984) (8a) (emphasis added).

Petitioners' statement that the new provision explicitly requiring the jury to make *Enmund* findings is only a "recommended procedure" (Pet. Brief at 77) is puzzling. The statute is phrased in mandatory terms, and the case cited by petitioners to support their statement, *Newell v. State*, 308 So. 2d 71 (Miss. 1975), is not a capital case and predates both *Enmund* and the amendment to § 99-19-101. (The other two cases cited by petitioners, *Cabello v. State*, No. 55, 581, ___ So. 2d ___ (Miss. May 1, 1985); *Johnson v. State*, No. 55, 265, ___ So. 2d ___ (Miss. May 8, 1985), also do not discuss the amended statute and at most suggest that it is not being applied retroactively by the Mississippi Supreme Court, not that its procedures are only "recommended.")

> 1. Did defendant deliver the fatal blows which caused the victim's death?
>
> 2. If not, did defendant, while acting as an aider and abettor, attempt to kill, intend to kill, or contemplate that life would be taken during the commission of the felony?
>
> . . . .
>
> If the jury should answer either of the above-stated questions "yes", then the jury would proceed to hear competent evidence concerning the aggravating and mitigating circumstances and return its recommendation as to whether defendant's punishment should be imprisonment for life or the death sentence. However, if the jury should answer both issues "no", it would return a recommendation of life imprisonment.

*Id.* at 651-52, 304 S.E.2d at 195.[30]

Similarly, in *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984), *cert. denied*, 105 S. Ct. 1774 (1985), the Georgia Supreme Court described a procedure for the lower courts to follow to comply with the requirements of *Enmund*:

> [R]esolution of an *Enmund* issue is not facilitated by the practice of allowing a general verdict of guilty in a case in which both malice murder and felony murder are charged to the jury. Requiring the jury to specify whether the defendant is guilty of malice murder or of felony murder would clarify the jury's findings in this respect. Therefore, we suggest that in such a case the jury be instructed on three possible verdicts (guilty of malice murder, guilty

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30 The court further explained that

> [j]udicial economy requires that when first-degree murder is submitted to the jury on more than one theory at the guilt-innocence phase of the trial, the trial judge should submit the issues so as to require the jury to indicate the theory upon which their verdict is returned. This requirement would, in many instances, obviate the necessity of considering the *Enmund* holding at the sentencing phase of a trial.

*Id.* at 651, 304 S.E.2d at 195 n.1 (citation omitted).

> of felony murder or not guilty) instead of the usual two (guilty or not guilty).

253 Ga. at 395 n.3, 321 S.E.2d at 715 n.3;[31] *but see Stevens v. Kemp*, 254 Ga. 228, 327 S.E.2d 185 (1985) (apparently sustaining death sentence based on evidence in the record).

The California Supreme Court has required that the jury find intent to kill before a death sentence can be imposed. *See People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 105 S. Ct. 1229 (1985); *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

The Oklahoma Supreme Court also apparently requires *Enmund* findings by the jury before the death penalty may be imposed. In *Hatch v. Oklahoma*, 662 P.2d 1377 (Okla. Crim. 1983), the Court remanded a case for resentencing "in light of *Enmund*" so that the sentencer[32] could "give greater attention to the evidence concerning . . . Hatch's individual participation and intent in the events which culminated in the murder/shootings." *Id.* at 1383.[33]

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31 In light of *Allen*, Georgia's appearance as an *amicus* in this case is puzzling. The Supreme Court of Georgia has already taken steps to ensure compliance by that state's courts with the due process requirement that the *Enmund* findings be made by the jury.

32 Although the remand in *Hatch* was to the trial court, that was because Hatch waived his right to a jury, and was sentenced by the judge. *Id.* at 1379. Since capital sentencing decisions in Oklahoma are made by a jury absent such a waiver, Okla. Stat., Tit. 21, § 701.11 (1983), presumably the Oklahoma Supreme Court would ordinarily require the *Enmund* findings to be made by the jury.

33 In Arizona, the state supreme court has interpreted *Enmund* as requiring the trial judge—who makes the sentencing decision under Arizona law—to make an *Enmund* finding before imposing the death penalty. *See State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983):

> In order to comply with *Enmund*, therefore, we believe that in future cases where the jury might have found the defendant guilty of first degree murder based on a felony-murder theory, the trial judge must determine beyond a reasonable doubt prior to imposing a sentence of death that the defendant killed, attempted to kill or intended to kill.

*Id.* at 81, 665 P.2d at 81.

In all, of the 17 states identified in *Enmund* as potentially authorizing unconstitutional death penalties, six have taken steps to require *Enmund*

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These actions by state courts and legislatures refute petitioners' (and *amici curiae*'s) argument that requiring the jury to make the *Enmund* findings will impose an unreasonable burden on the states. Even before *Enmund*, most states, by their definitions of which crimes were capital, required that *Enmund*-type findings be made by the jury before the death penalty could be imposed. Plainly, such a procedure is not burdensome. Moreover, since *Enmund*, several of the states that did not already require the jury to make *Enmund* findings before a death penalty could be imposed—including Mississippi—have corrected their capital sentencing procedures to do so. The constitutionally mandated procedure is neither unworkable nor burdensome.[34]

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findings before a death sentence can be imposed (five require such findings by the jury: Mississippi, Georgia, North Carolina, California, and (presumably) Oklahoma; one by the trial judge: Arizona); six appear to have taken the position that evidence in the record is sufficient and that express *Enmund* findings by the judge or jury are not required (Indiana, Wyoming, Tennessee, South Carolina, Idaho and Florida, although Florida has on occasion remanded a case for a trial court finding of the *Enmund* factors, *see Brumbley v. State*, 453 So. 2d 381 (Fla. 1984)); and the remaining five have not yet addressed the issue of who must make the *Enmund* findings (Nevada, Nebraska, Montana, Connecticut and South Dakota; Connecticut and South Dakota do not have any individuals on death row. *See* NAACP Legal Defense and Educational Fund, *Death Row, U.S.A.* (August, 1985)).

Thus at most twelve—and perhaps as few as seven—states potentially allow imposition of the death penalty without a finding by the jury of the *Enmund* factors. The fact that the vast majority of the 37 states with capital punishment statutes require *Enmund* findings to be made by the jury before a death sentence may be imposed further supports the conclusion that that procedure is required by due process. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968); *cf. Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

34 Indeed, requiring the *Enmund* findings to be made by the jury should *reduce* the burden on the states by providing greater certainty in the capital sentencing process. If the jury has made *Enmund* findings under proper instructions, the role of an appellate court on an *Enmund* challenge on direct or collateral review would be limited to determining whether there was sufficient evidence to support the finding. Requiring explicit *Enmund* findings by the jury would also reduce the degree of federal court involve-

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Because the *Enmund* findings are constitutionally required elements of a death sentence for felony murder, they must be found by the jury under the established principle of due process that all elements of a crime must be found by the jury.

**B. Because Mississippi State Law Required That All Capital Sentencing Findings Be Made By The Jury, Bullock Had A Due Process Right To Have The *Enmund* Findings Made By The Jury.**

Even if due process did not universally require that *Enmund* findings be made by the jury, it would nevertheless require that they be made by the jury in those states where state law requires the jury to make capital sentencing findings.

The Mississippi statutes under which Bullock was tried and sentenced required the jury to make all findings at both the guilt and sentencing phases in capital cases. *See* Miss. Code Ann. § 99-19-101 (since amended) (2a); § 99-19-103 (Cum. Supp. 1984) (9a).[35] The role of the jury is so fundamental in the Mississippi capital sentencing scheme that even if the defendant pleads guilty to capital murder a jury will be empaneled solely for the purpose of determining the appropriate sentence. *See* Miss. Code Ann. § 99-19-101(1) (Cum. Supp. 1984) (3a). Relying on the provisions of Mississippi law placing the capital sentencing decision with the jury, this Court recently held that a prosecutor's statements to a Mississippi jury suggesting that the responsibility for the sentencing decision lay

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ment in the state capital sentencing process by narrowing the scope of *habeas* review.

Moreover, since in all states the jury already must make the determination of guilt, compliance with the rule that *Enmund* findings must be made by the jury would be administratively simple. In those few cases where the capital crime did not itself include *Enmund* factors, the jury could be asked to make supplementary *Enmund* findings at the guilt phase, at the sentencing phase, or at an interim phase.

35 As noted above, the 1983 amendments to the Mississippi capital sentencing statute made explicit the requirement that the *Enmund* findings must be made by the jury. *See supra* at 23-24.

elsewhere required reversal of a death sentence. *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985). *See also Hill v. State*, 432 So. 2d 427 (Miss.), *cert. denied*, 464 U.S. 977 (1983):

> In the usual case the jury merely determines guilt or innocence, and the circuit judge determines the sentence. In a capital murder case the jury also determines the sentence.
>
> Any argument by the state which distorts or minimizes this solemn obligation and responsibility of the jury is serious error. Every attorney knows the jury verdict is indeed the last word on a factual dispute. Neither the circuit judge nor this Court is authorized to set aside a jury verdict on conflicting evidence, or a disputed factual issue. Moreover, in a death penalty case a jury should never be given false comfort that any decision they make will, or can be, corrected.
>
> . . . .
>
> A prosecutor making this sort of argument is asking for a mistrial.

*Id.* at 439; *accord*, *Wiley v. State*, 449 So. 2d 756 (Miss. 1984); *Williams v. State*, 445 So. 2d 798 (Miss. 1984), *cert. denied*, 105 S. Ct. 803 (1985).[36]

Provisions of state law like Mississippi's capital sentencing statute create a constitutionally protected liberty interest such that deprivation of the procedures required by state law constitutes a denial of due process. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam); *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1

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36 As the Mississippi Supreme Court stated in *Williams*:

> The structure of the capital sentencing system enacted by our Legislature places the entire sentencing burden on the jury. No judge or other official within our system has the power to impose the sentence of death; only the jury.

445 So. 2d at 811. *See also Wiley*, 449 So. 2d at 462:

> Under our law the jury is the sole player in the judicial process who may vote to send an accused to die. . . . While a jury is not literally "the hangman," only they may supply the hangman's victims.

(1979); *cf. Bullington v. Missouri*, 451 U.S. 430 (1981). As the Court stated in *Vitek v. Jones*, 445 U.S. 480 (1980):

> We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.

*Id.* at 488; *accord*, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State.").

This Court's decision in *Hicks v. Oklahoma*, 447 U.S. 343 (1980), establishes that the Mississippi capital sentencing statute gave Bullock a due process right to have the *Enmund* findings made by the jury. Under Oklahoma law, a convicted defendant has the right to have his punishment fixed by the jury. Okla. Stat., Tit. 22, § 926 (1971). Hicks' jury was instructed that if they found him guilty they were required to fix his punishment at 40 years imprisonment under the Oklahoma habitual offender statute. After Hicks' conviction, the mandatory sentencing provisions of that statute were struck down by the state court; therefore, Hicks' jury should have been given the option to fix his punishment at any term above 10 years. Rather than vacate Hicks' sentence and remand the case for resentencing, however, the Oklahoma Court of Criminal Appeals affirmed the sentence because it was "within the range of punishment that could have been imposed in any event." 447 U.S. at 345 & n.2 (citing *Hicks v. State*, No. F-77-751 (Mar. 8, 1979)).

This Court reversed, holding that the deprivation of Hicks' state law right to have the jury determine his sentence constituted a denial of due process. In so holding, the Court explicitly rejected the argument that all that was involved was an error of state law:

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state

> procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

447 U.S. at 346 (emphasis in original; citations and footnote omitted).

Bullock had a right under Mississippi law to have all findings necessary for imposition of the death penalty made by the jury. The *Enmund* factors are such findings; consequently, Bullock had a "substantial and legitimate expectation—that he [would] be deprived of his [life] only to the extent determined by the jury . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." 447 U.S. at 346. Moreover, Mississippi has not put forward even a "frail conjecture" to support the deprivation of Bullock's right to have the *Enmund* factors found by the jury—the state simply delayed for a brief period before amending its capital sentencing statute to conform with *Enmund*. "Such an arbitrary disregard of [Bullock's] right to liberty is a denial of due process of law." 447 U.S. at 346.

Similarly, in *Presnell*, the Court reversed a death sentence where the state appellate court had supplied a finding that was required to be made by the jury under Georgia law. 439 U.S. at 14-17.[37] As in *Hicks*, deprivation of the defendant's state law

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37 A comparison of *Presnell* with *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), reinforces the conclusion that the capital sentencing procedures of Mississippi state law have due process implications. In *Time*, a civil libel action, the Court suggested that because Florida law did not require a finding of fault at the trial level, such a finding on appeal would have been

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right to have particular findings made by the jury violated due process.

This Court's decisions interpreting the due process requirement that all elements of a crime be found beyond a reasonable doubt by the jury further support the conclusion that Mississippi's capital sentencing provisions create a constitutionally protected liberty interest. Because Maine's homicide statutes made the absence of heat of passion an element of murder, due process required the state to prove that fact beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In contrast, because New York state law made extreme emotional disturbance an affirmative defense reducing murder to manslaughter, the state could constitutionally require the defendant to establish this fact. *Patterson v. New York*, 432 U.S. 197 (1977). As the Court stated in *Patterson*: "The applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case. . . ." *Id.* at 211 n.12.[38]

As a result of the provisions of Mississippi law requiring that all capital sentencing findings must be made by the jury, a defendant tried for capital murder in Mississippi has a due process right to have the *Enmund* findings made by the jury before a death sentence may be imposed.

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acceptable as a matter of constitutional due process. 424 U.S. at 461-62. In contrast, in *Presnell*, where state law required the findings to be made by the jury, the Court held that those findings could not be supplied on appeal.

38 This Court has also frequently held that state law has due process consequences in the area of creating protected property interests. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Bishop v. Wood*, 426 U.S. 341 (1976).

### C. Bullock's Jury Was Not Required To Find That He Killed, Attempted To Kill, Intended To Kill, Or Contemplated The Use Of Lethal Force.

Bullock was indicted, tried, convicted and sentenced on the theory that he aided and abetted in a robbery in the course of which the victim was killed by someone else. Consequently, the jury instructions given at Bullock's trial did not require a finding that he killed, attempted to kill, intended to kill, or contemplated the use of lethal force.

Indeed, petitioners have abandoned any argument that the jury instructions complied with *Enmund*. In any event, it is clear that the instructions were defective. Instruction 15 only required the jury to find that Dickson was killed in the course of a robbery, whether by Bullock or by "another," and further stated that the jury could find Bullock guilty of capital murder if he aided in the robbery and if he "alone, or while acting in concert with another," "consent[ed] to the killing" and "did any overt act which was immediately connected with or leading to its commission . . . whether done with or without any design to effect the death of said Mark Dickson." (TR 1414; JA 88) Instruction 16 allowed a conviction even if the killing was done "without malice." (TR 1420; JA 90-91) Although there was partially contradictory language elsewhere in Instruction 16, nowhere were the erroneous instructions corrected.

This Court has recently reaffirmed that the use of ambiguous jury instructions which could be misinterpreted by a reasonable juror requires reversal. *Francis v. Franklin*, 105 S. Ct. 1965 (1985). In *Francis*, there were contradictory instructions on the presumption of intent, just as here there were contradictory instructions on the question of actually killing. As in *Francis*, the ambiguity is fatal.

> Even if a reasonable juror could have understood the prohibition of presuming "criminal intention" as applying to the element of intent, that instruction did no more than contradict the instruction in the immediately preceding sentence. A reasonable juror could easily have resolved the contradiction in the instruction by choosing to

> abide by the mandatory presumption and ignore the prohibition of presumption. Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. *Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.*

*Id.* at 1975 (emphasis added; footnote omitted).[39]

*Francis* is merely the latest in a long line of decisions in which this Court has held that jury instructions that are ambiguous on an essential element of the crime require reversal. *See, e.g., Bollenbach v. United States*, 326 U.S. 607 (1946).

> [W]e are asked to sustain the conviction on the assumption that the jury was properly guided. The Government contends that the court below failed to appreciate several factors in regard to the criticized charge. What reason is there for assuming that the jury did not also fail to appreciate these factors . . . ? *A conviction ought not to rest on an equivocal direction to the jury on a basic issue.*

*Id.* at 613 (emphasis added). *Accord, Sandstrom v. Montana*, 442 U.S. 510, 526 (1979) (emphasis in original) (conviction reversed: "even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do").

Moreover, this Court has consistently held that evidence in the record, or the view of the judge or an appellate court, is no substitute for a required jury finding, and does not cure ambiguous jury instructions.

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39 *Francis* explicitly rejected the "at least likely" test urged by the dissent in that case, under which a jury instruction would be held invalid "only when 'it is at least likely' " that a reasonable juror understood the instruction unconstitutionally. *Id.* at 1975 n.8 (quoting *id.* at 1985 (Rehnquist, J., dissenting)).

> A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. . . . No matter how clear the evidence, [the defendants] are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. *To repeat, guilt is determined by the jury, not the court.*

*United Brotherhood of Carpenters*, 330 U.S. at 409-10 (emphasis added); *see also Bollenbach v. United States*, 326 U.S. 607 (1946):

> [T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> . . . . In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance. . . .

*Id.* at 614-15; *accord*, *Morissette v. United States*, 342 U.S. 246 (1952):

> Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.

*Id.* at 274 (quoting *People v. Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)); *see also Stevenson v. United States*, 162 U.S. 313, 323 (1896).

As in *Francis*, Bullock's jury "was left in a quandary" as to which instruction to follow. 105 S. Ct. at 1976. Consequently, the instructions were fatally defective. Bullock's jury was not required to make any of the *Enmund* findings. As the Fifth Circuit held in vacating his death sentence:

> Bullock contends that his death sentence is constitutionally infirm under *Enmund* because the instructions to the jury permitted the death sentence without a specific finding that Bullock either killed, attempted to kill, or intended a killing or the use of lethal force. Such was the argument proffered in [*Reddix v. Thigpen*, 728 F.2d 705 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 397 (1984)]. We were persuaded in *Reddix*; we are likewise now so persuaded.

*Bullock v. Lucas*, 743 F.2d 244, 247 (5th Cir. 1984) (A 12-13).[40]

Bullock's death penalty "may not stand in light of the jury instruction[s] which would permit the imposition of the death penalty merely because Bullock participated in the robbery 'with or without any design to effect the death of . . . Mark Dickson.' " *Id.* at 248 (A 18).

**D. Petitioners' Argument That The *Enmund* Findings Can Be Made By A State Appellate Court Confuses This Court's Role In Constitutional Adjudication With The Jury's Role As Trier Of Fact.**

Petitioners argue that "[t]he individualized treatment envisage[d] by *Enmund* is *not* a factual question to be decided by a jury but is instead a question of proportionality to be decided by an appellate court." Pet. Brief at 67 (citing *Pulley v. Harris*, 104 S. Ct. 871 (1984), and *Solem v. Helm*, 463 U.S. 277 (1983)). But petitioners have confused this Court's role as interpreter of the Eighth Amendment's ban on cruel and unusual punishment with the jury's role as trier of fact in criminal cases.[41] There is no dispute that constitutional proportionality decisions are made by appellate courts, not juries.

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40 The danger that Bullock's jury interpreted the instructions improperly was heightened by the prosecutor's statements that the state did not have to prove that Bullock killed Dickson, but only that he aided and abetted in the robbery. *See supra* at 9-10.

41 *Amici curiae* make the same error in arguing for reversal. *See* Brief of *Amici Curiae* at 6-7.

However, once this Court has determined which crimes can constitutionally be punished by death (such as intentional murder) and which cannot (such as rape or felony murder where the defendant did not kill, attempt to kill, intend to kill or contemplate the use of lethal force), it remains for the jury to determine whether a particular defendant has committed a crime which makes him "death eligible."

> [T]he determination has been made by the highest tribunal in this country that an "*Enmund* type" defendant cannot under our Constitution be eligible for the death penalty. The determination of whether an accused is an "*Enmund* type" defendant is a question of fact. The determination is identical to that of a jury decision of whether an accused is guilty of murder, voluntary manslaughter or involuntary manslaughter.

*Ross v. Kemp*, 756 F.2d 1483, 1496 (11th Cir. 1985) (en banc) (Clark, J., concurring in part and dissenting in part).[42]

Clearly, an appellate court reviewing a case where the death penalty was imposed on a convicted rapist could not say that its review of the record convinced it that the defendant had committed murder and, therefore, that the death sentence could be affirmed. Similarly, an appellate court faced with a defendant convicted only of the kind of felony murder for which death is a disproportionate penalty cannot search the record and itself find the presence of an *Enmund* factor not found by the jury in order to allow imposition of the death penalty. *Cf. Cole v. Arkansas*, 333 U.S. 196 (1948) (violation of due process where state appellate court affirmed a prison sentence on the basis of a charge on which the defendant was not tried or convicted); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam) (violation of due process where state appellate

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42 Petitioners would reduce this Court's role to little more than expressing its agreement or disagreement—as a matter of sentencing discretion—with the imposition of the death sentence on a particular defendant. This Court has consistently declined such a role. *See, e.g., Spaziano v. Florida*, 104 S. Ct. 3154, 3166 (1984); *Barclay v. Florida*, 463 U.S. 939, 972 (1983) (Stevens and Powell, JJ., concurring).

court affirmed a death sentence on the basis of an aggravating circumstance not found by the jury).[43]

## III

## EVEN IF THE *ENMUND* FINDINGS NEED NOT BE MADE BY THE JURY, THEY MUST BE MADE AT THE TRIAL LEVEL, AND THEY WERE NOT IN THIS CASE.

Even if due process does not absolutely require the *Enmund* findings to be made by the jury, they must in any event be made at the trial level and cannot be supplied by an appellate court. Indeed, even if the *Enmund* findings were no more than aggravating or mitigating circumstances, they would still have to be made at the trial level rather than at the appellate level. The capital sentencing statutes approved by this Court have all given authority for imposing the death sentence to the jury or trial judge. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The decisions of this Court, especially the decisions requiring the consideration of mitigating circumstances, *see, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), establish that the findings giving rise to imposition of the death penalty must be made at the trial level, by someone who has actually seen the witnesses and heard the testimony. As the Court explained in reversing the death sentence in *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985):

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43 *Pulley v. Harris*, 104 S. Ct. 871 (1984) and *Solem v. Helm*, 463 U.S. 277 (1983), the cases principally relied upon by petitioners and *amici curiae*, are not to the contrary. *Pulley* held that the Eighth Amendment does not require comparative proportionality review in every capital case. It is irrelevant to the issue here. *Solem* held that the punishment imposed on Helm was disproportionate to the crime for which he had been convicted. The Court did not engage in its own fact finding; rather, it compared the penalty imposed on Helm to the crime of which he had been convicted. Nothing in *Solem* suggests that appellate courts can make factual findings that are constitutionally required before a particular sentence may be imposed. *Solem*, too, is irrelevant to this case.

> When we held that a defendant has a constitutional right to the consideration of such [mitigating] factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.

*Id.* at 2640. If aggravating and mitigating circumstances can only be found at the trial level, *a fortiori*, the same is true for the *Enmund* findings which have a constitutional significance not enjoyed by simple aggravating and mitigating circumstances. *See supra* at 19-21.

This Court has already held that findings necessary for imposition of the death penalty must be made at the trial level and cannot be supplied on appeal.[44] In *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam), the jury had imposed the death sentence after finding as one of the aggravating circumstances that the murder was committed while Presnell was engaged in the commission of "kidnapping with bodily harm, aggravated sodomy." On appeal, the Georgia Supreme Court held that the state could not rely on sodomy as the bodily injury associated with kidnapping, and further held that the jury had not properly convicted Presnell of forcible rape. However, it affirmed the death sentence "on the theory that, despite the lack of a jury finding of forcible rape, evidence in the record

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44 Indeed, if petitioners were correct that the *Enmund* findings could be made by an appellate court, the sentencing procedure would run afoul of the Double Jeopardy Clause of the Fifth Amendment. A procedure that allowed the prosecution to try to persuade any one of a series of entities (the jury, the trial judge and the appellate courts) of the presence of the *Enmund* findings would constitute a constitutionally impermissible attempt to "give[ ] the Government the opportunity to convince a second fact finder of its view of the facts." *Bullington v. Missouri*, 451 U.S. 430, 440 (1981); *see also Swisher v. Brady*, 438 U.S. 204, 216 (1978) ("The Double Jeopardy Clause also precludes the prosecutor from 'enhanc[ing] the risk that an innocent defendant may be convicted,' *Arizona v. Washington*, [434 U.S. 497, 504 (1978)], by taking the question of guilt to a series of persons or groups empowered to make binding determinations."); *cf. Caldwell v. Mississippi*, 105 S. Ct. 2633, 2641 (1985) ("a sentence of life in prison could not be increased to a death sentence on appeal" (citing *Arizona v. Rumsey*, 104 S. Ct. 2305 (1984)); *Spaziano v. Florida*, 104 S. Ct. 3154, 3162 (1984) (sentencer's decision for life is final).

supported the conclusion that petitioner was guilty of that offense," which made the kidnapping an aggravating circumstance. 439 U.S. at 15-16. This Court reversed, on due process grounds, because the state appellate court could not provide the finding that had to be made by the jury. The Court noted that due process prohibits sending an accused to prison "following conviction of a charge on which he was never tried," and that

> [t]o conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and *as the issues were determined in the trial court.*

*Id.* at 16 (emphasis added) (quoting *Cole v. Arkansas*, 333 U.S. 196, 202 (1948)). The Court held that

> [t]hese fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial.

439 U.S. at 16 (citation omitted).[45] *Presnell* established that findings by an appellate court are not a sufficient basis for imposing the death penalty.

Similarly, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court reversed a death sentence and remanded the case for a new sentencing hearing because in imposing the sentence the trial judge had relied, in part, on a report not made available to the defendant. The Court rejected the possibility of simply remanding the case to the Florida Supreme Court to consider the report in its reviewing function.

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45 The dissent in *Presnell* agreed that due process would be violated "if . . . the Supreme Court of Georgia had found petitioner guilty of kidnapping with bodily injury in spite of a failure of the jury to return a proper guilty verdict for that crime." 439 U.S. at 17-18 (Powell, J., dissenting). The dissent simply disagreed with the majority's reading of the Georgia Supreme Court's opinion.

> That procedure, however, could not fully correct the error. For it is possible that full disclosure, followed by explanation or argument by defense counsel, would have caused the trial judge to accept the jury's advisory verdict. Accordingly, the death sentence is vacated, and the case is remanded to the Florida Supreme Court with directions to order further proceedings *at the trial court level* not inconsistent with this opinion.

*Id.* at 362 (plurality opinion) (emphasis added); *cf. Lockett v. Ohio*, 438 U.S. 587, 627 (1978) (White, J., concurring in part and dissenting in part) (death sentence should be reversed because "no findings were made either *during the trial or sentencing stage of the process* that Bell intended the death of the victim . . ." (emphasis added)).

Moreover, the limited role of an appellate court on review makes it an inappropriate body to give the "individualized consideration [which is] a constitutional requirement in imposing the death sentence." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (footnote omitted). As the Court recently explained in reversing the death sentence in *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), because the prosecutor's arguments may have led the jury to believe that the responsibility for determining the appropriateness of the death penalty rested with the appellate court:

> Bias against the defendant clearly stems from the institutional limits on what an appellate court can do. . . . The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argu-

> ment for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind."

*Id.* at 2640 (citation omitted);[46] *cf. Lyons v. Oklahoma*, 322 U.S. 596 (1944):

> where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. . . . The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike.

*Id.* at 602-03.

Allowing an appellate court to make the findings from a cold paper record would introduce "a level of uncertainty and unreliability [in] the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 643 (1980).

Factual findings necessary to support imposition of the death penalty must be made at the trial level. They cannot be supplied by an appellate court. Because there were no *Enmund* findings by the judge or the jury at Bullock's trial or sentencing, his death sentence was properly vacated.

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46 *See also id.* at 2645 n.7:

> It is beyond question that an appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the "literally countless factors that [a capital sentencer] consider[s,]" [*Zant v. Stephens*, 462 U.S. 862, 901 (1983) (Rehnquist, J., concurring)], in making what is largely a moral judgment of the defendant's desert.

## IV

## EVEN IF THE *ENMUND* FINDINGS COULD BE MADE BY A STATE APPELLATE COURT, NO SUCH FINDINGS WERE MADE HERE.

Even if it were to be held that the *Enmund* findings could be made by a state appellate court, the judgment below should still be affirmed because there were no such findings by the Mississippi Supreme Court.

The Mississippi Supreme Court did not purport to engage in fact-finding. It did not disclose the basis for its recitation of the case—*i.e.*, it did not say if it was drawing its own conclusions based on its review of the record. Rather, it is more likely that the court was using the normal standard of appellate review and viewing the evidence in the light most favorable to the state.[47] Moreover, the case against Bullock—from the Mississippi felony murder statute, to the indictment, to the prosecution, to the jury instructions—was consistently based on the theory that he aided and abetted in the robbery, and "that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing." *Bullock v. Lucas*, 743 F.2d at 248 (A 19) (Garwood, J., concurring). It is clear that the decision of the Mississippi Supreme Court affirming Bullock's conviction and death sentence was based on precisely the same theory of accomplice liability—since Bullock aided and abetted in a robbery in the course of which the victim was killed he could be sentenced to death under the Mississippi capital felony murder statute:

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47 The Mississippi Supreme Court has emphasized the "severely limited" nature of its review in capital cases, *Williams v. State*, 445 So. 2d 798, 811 (Miss. 1984), *cert. denied*, 105 S. Ct. 803 (1985) under which the jury makes the determination of who will be sentenced to death, "and all review is then conducted with a presumption of its correctness." *Wiley v. Mississippi*, 449 So. 2d 756, 762 (Miss. 1984).

> The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender.

*Bullock v. State*, 391 So. 2d 601, 614 (Miss. 1980) (citations omitted) (A 116). The court's recitation of facts limits Bullock's involvement (other than in disposing of the body) to the two times he grabbed Dickson; the court made no statement as to Bullock's motive in grabbing Dickson. The furthest the court went in implicating Bullock in the crime was its statement that Bullock "was an active participant in the assault and homicide. . . ." *Id.* at 614 (A 117); *see also id.* at 606 (A 81) (Bullock was "present, aiding and assisting in the assault upon, and slaying of, Dickson. . . ."). The influence of aiding and abetting or accomplice liability is apparent in these statements, and nowhere is there an express finding of any of the *Enmund* factors. This is hardly surprising since the theory of the prosecution was based on Bullock's role as an accomplice in the robbery, and since the court decided Bullock's appeal before *Enmund* was decided.

Under these circumstances, even if the *Enmund* findings could be made by a state appellate court, the opinion of the Mississippi Supreme Court cannot be construed as making any *Enmund* findings.[48] The federal habeas corpus statute provides that state court determinations are not entitled to a presumption of correctness if "the merits of the factual dispute were not resolved in the State court hearing," 28 U.S.C. § 2254(d)(1) (1982), and the dispute about the presence of the *Enmund*

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48 Petitioners concede that the Mississippi Supreme Court did not make any findings "couched in the terms of the *Enmund* criteria," Pet. Brief at 86, but urge that "implicitly" there was "substantial compliance with the [*Enmund* criteria]." *Id.* Because of the unique nature of the death penalty, "unique safeguards," *Spaziano v. Florida*, 104 S. Ct. 3154, 3167 (1984) (Stevens, Brennen and Marshall, JJ., concurring in part and dissenting in part), are necessary to ensure "reliability in the determination that death is the appropriate remedy. . . ." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). "Implicit substantial compliance" with constitutional requirements cannot support a death sentence. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam); *Gardner v. Florida*, 430 U.S. 349 (1977).

factors was not resolved by the Mississippi Supreme Court. As the Court stated in *Townsend v. Sain*, 372 U.S. 293 (1963), in discussing state court findings of fact,

> [t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant.

*Id.* at 313-14.

Where, as here, no express findings of fact were made by the state court, it may still be possible to reconstruct the finding from other indicia in the court's opinion, but

> [r]econstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim.

*Id.* at 314. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court reversed a civil judgment because there was no clear indication that the state courts had made a critical factual determination.

> Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here. But that deference is predicated on our belief that at some point in the state proceedings some factfinder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion.

*Id.* at 463 (citations omitted).[49] If reversal is required in a civil case where it is unclear that a critical fact has been found, *a*

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49 In *Time*, the Court held that there was insufficient evidence of a finding of fault by the Florida Supreme Court, even though that court stated that Time's report was a "flagrant example of 'journalistic negligence.' " *Id.* at 463 (quoting *Firestone v. Time, Inc.*, 305 So. 2d 172, 178 (Fla. 1974)). Without some clear indication, the Court was unwilling to "attribute to the Supreme Court of Florida . . . an intention to find such a fact in the first instance." 424 U.S. at 463. There is no indication in the Mississippi Supreme Court's opinion of "an intention to find [the *Enmund* factors] in the first instance."

*fortiori*, a death sentence cannot stand under such circumstances.

The Mississippi Supreme Court made no express findings of fact in affirming Bullock's conviction and sentence. Moreover, it is clear that the Mississippi Supreme Court did not apply the correct constitutional standard: as noted above, its decision predated *Enmund*, contains no *Enmund* analysis, and the court clearly relied on the accomplice liability theory invalidated in *Enmund* as a basis for capital punishment. Under these circumstances,

> any hypothesis as to the relevant factual determinations of [the Mississippi Supreme Court] involves the purest speculation.

*Townsend*, 372 U.S. at 315.

A sentence of death should not stand on such a tenuous basis.

## CONCLUSION

Following a conviction for felony murder, Bullock was sentenced to death by a jury that was not required to find that he killed, attempted to kill, intended to kill, or contemplated the use of lethal force. The constitutional infirmity of the capital sentencing statute under which Bullock was sentenced to death was recognized by this Court in *Enmund* and has since been acknowledged and corrected by the Mississippi legislature.

Bullock is entitled to a jury determination of his "personal responsibility and moral guilt," *Enmund*, 458 U.S. at 801, before he may be sentenced to death. He has been deprived of that constitutional right. Mississippi should not be allowed one last cruel and unusual punishment before complying with the requirements of *Enmund* and its own corrected capital sentencing statute.

Bullock's death sentence was properly vacated by the Court of Appeals. The decision below should be affirmed.

Dated: New York, New York
September 9, 1985

Respectfully submitted,

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# APPENDIX

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## STATUTORY MATERIALS

MISS. CODE ANN. § 97-3-19 (since amended)

§ 97-3-19. HOMICIDE; MURDER DEFINED; CAPITAL MURDER.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriffs of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax

commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

MISS. CODE ANN. § 99-19-101 (since amended)

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING: AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine

the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstance shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

(g) The age of the defendant at the time of the crime.

MISS. CODE ANN. § 9-19-101 (Cum. Supp. 1984)*

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine

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* Language added by 1983 amendment is italicized.

the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

*(a) Whether sufficient factors exist as enumerated in subsection (7) of this section*;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

*(a) That sufficient factors exist as enumerated in subsection (7) of this section*;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) That there are insufficent mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific

written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstance shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

*(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:*

*(a) The defendant actually killed;*

*(b) The defendant attempted to kill;*

*(c) The defendant intended that a killing take place;*

*(d) The defendant contemplated that lethal force would be employed.*

MISS. CODE ANN. § 99-19-103 (19) (Cum. Supp. 1984)

§ 99-19-103. INSTRUCTIONS; AGGRAVATING CIRCUMSTANCES SHALL BE DESIGNATED BY JURY IN WRITING; EFFECT OF JURY'S FAILURE TO AGREE ON PUNISHMENT.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

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No. 84-1236 (8)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

DONALD A. CABANA, SUPERINTENDENT, ET AL.,
*Petitioners,*

—v.—

CRAWFORD BULLOCK, JR.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## SUPPLEMENTAL BRIEF FOR RESPONDENT

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October 28, 1985

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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—v.—

CRAWFORD BULLOCK, JR.,
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## SUPPLEMENTAL BRIEF FOR RESPONDENT

---

Respondent, Crawford Bullock, Jr., submits this Supplemental Brief to bring to the Court's attention a case decided after the submission of respondent's brief on the merits.

South Carolina has joined the growing number of states that have determined that the findings mandated by *Enmund v. Florida*, 458 U.S. 782 (1982), must be made *by the jury* before a death sentence may be imposed (*see* Brief for Respondent at 23-27). In reversing two death sentences, the South Carolina Supreme Court recently held:

> In *Enmund v. Florida*, 458 U.S. 782 (1982) the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty upon an individual who did not personally take life, attempt to take life, or intend that life be taken. During the penalty phase of death penalty cases which

involve conspiracy liability, *the trial judge should charge that the death penalty can not be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used.*

*State v. Peterson*, No. 22381, slip op. at 3-4 (S.C. Oct. 14, 1985) (per curiam) (emphasis added).[1]

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1 Thus, the last two paragraphs of footnote 33 on pages 26-27 of the Brief for Respondent should now read:

In all, of the 17 states indentified in *Enmund* as potentially authorizing unconstitutional death penalties, seven have taken steps to require *Enmund* findings before a death sentence can be imposed (six require such findings by the jury: Mississippi, South Carolina, Georgia, North Carolina, California, and (presumably) Oklahoma; one by the trial judge: Arizona); five appear to have taken the position that evidence in the record is sufficient and that express *Enmund* findings by the judge or jury are not required (Indiana, Wyoming, Tennessee, Idaho and Florida, although Florida has on occasion remanded a case for a trial court finding of the *Enmund* factors, *see Brumbley v. State*, 453 So. 2d 381 (Fla. 1984)); and the remaining five have not yet addressed the issue of who must make the *Enmund* findings (Nevada, Nebraska, Montana, Connecticut and South Dakota; Connecticut and South Dakota do not have any individuals on death row. *See* NAACP Legal Defense and Education Fund, *Death Row, U.S.A.* (August, 1985)).

Thus at most eleven—and perhaps as few as six—states potentially allow imposition of the death penalty without a finding by the jury of the *Enmund* factors. The fact that the vast majority of the 37 states with capital punishment statutes require *Enmund* findings to be made by the jury before a death sentence may be imposed further supports the conclusion that that procedure is required by due process. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968); *cf. Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

## CONCLUSION

For the reasons stated in the Brief for Respondent, Bullock's death sentence was properly vacated by the Court of Appeals. The decision below should be affirmed.

Dated: New York, New York
October 28, 1985

Respectfully submitted,

/s/ Joseph T. McLaughlin

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Office-Supreme Court, U.S.
FILED
JUN 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1236

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# Supreme Court of the United States
October Term, 1984

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SUPERINTENDENT, ET AL.,
v. *Petitioners,*
CRAWFORD BULLOCK, JR.,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF FOR STATES OF GEORGIA, FLORIDA, INDIANA AND WYOMING AS AMICI CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

The States of Georgia, Florida, Indiana and Wyoming by their Attorneys General will address the following question:

I.

Whether the United States Court of Appeals for the Fifth Circuit misconstrued this Court's holding in *Enmund v. Florida,* 458 U.S. 782 (1982), by requiring a trial court to give specific instructions to the jury on an individual defendant's culpability.

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No. 84-1236

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# Supreme Court of the United States

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CRAWFORD BULLOCK, JR.,

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF FOR STATES OF GEORGIA, FLORIDA, INDIANA AND WYOMING AS AMICI CURIAE SUPPORTING PETITIONERS

### INTEREST OF AMICI CURIAE

The instant brief is submitted on behalf of the States of Georgia, Florida, Indiana and Wyoming by their Attorneys General. Said brief is submitted in support of the position taken by the Petitioners in the instant action. The State of Georgia has a bifurcated sentencing proceeding for capital cases as does the State of Mississippi and also has provisions for the conviction of an individual for felony murder or for aiding and abetting in the commission of a crime. Under Georgia law, there is no requirement that a specific instruction be given to the jury to find that an individual either intended to kill, attempted to kill or con-

templated that life be taken before a death sentence can be imposed. In a case arising out of the State of Georgia, the Eleventh Circuit Court of Appeals sitting *en banc* has ruled contrary to the Fifth Circuit Court of Appeals. *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985) (*en banc*). The State of Georgia has the interest in preserving its death sentences and in preserving the holding of the Eleventh Circuit pertaining to this issue. The States of Florida, Indiana and Wyoming have similar interests in the instant case.

———o———

## STATEMENT

Respondent, Crawford Bullock, Jr., was found guilty of the crime of capital murder on May 18, 1979 in the Circuit Court of the First Judicial District of Hinds County, Mississippi. Pursuant to the Mississippi statutory bifurcated sentencing procedure, the Respondent received the death penalty; said sentence was subsequently affirmed by the Mississippi Supreme Court. *Bullock v. State*, 391 So. 2d 601 (Miss. 1980). A petition for a writ of certiorari was denied by this Court on June 8, 1981. *Bullock v. Mississippi*, 452 U.S. 931 (1981).

Respondent subsequently filed an application for leave to file a petition for a writ of error coram nobis with the Mississippi Supreme Court and simultaneously filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Mississippi. Identical grounds were contained in these two petitions. On October 7, 1981, the state application for post-convic-

tion relief was denied. On July 22, 1983, a final judgment was entered in the district court denying relief and a certificate of probable cause to appeal was denied. The court subsequently reversed its position on the certificate of probable cause to appeal.

The case was then appealed to the United States Court of Appeals for the Fifth Circuit. On September 21, 1984, that court reversed the decision of the district court as to the sentencing phase based on a finding of a violation of *Enmund v. Florida*, 458 U.S. 782 (1982). *Bullock v. Lucas*, 743 F.2d 244 (5th Cir. 1984). A subsequent petition for panel rehearing and suggestion for rehearing *en banc* were denied without opinion. *Bullock v. Lucas*, 747 F.2d 1464 (5th Cir. 1984). Petitioners then filed a petition for a writ of certiorari in this Court dated January 29, 1985. Certiorari was granted by this Court on April 22, 1985. *Cabana v. Bullock*, 53 U.S.L.W. 3757 (U.S. April 22, 1985).

---

## SUMMARY OF ARGUMENT

The decision by this Court in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), clearly involves a proportionality review under the Eighth Amendment's prohibition against cruel and unusual punishment. This Court in *Enmund* prohibited the imposition of the death penalty on one who simply aided and abetted in the commission of a felony, but did not kill, attempt to kill or intend that a killing take place or contemplate that lethal force might be employed. *Enmund, supra*, 102 S.Ct. at 3376. At no

time did the Court set forth a requirement that there be some type of special verdict by either the trial jury or the sentencing jury finding such intent on the part of a defendant. The very nature of an Eighth Amendment analysis contemplates review by an appellate court or court on collateral review and not by the trial jury itself. The question presented under *Enmund* is simply whether the death penalty imposed in any given case is disproportionate in light of the facts and circumstances of that case, not whether the jury specifically found that the defendant had the requisite mental state. The holding by the Fifth Circuit Court of Appeals in the instant case requiring such a specific jury finding extends the holding of *Enmund v. Florida, supra*, past the limit set by this Court and recognized in later cases, and ignores the fact that the decision is solely a proportionality review. Thus, the decision by the Fifth Circuit Court of Appeals to this extent should be reversed.

---

## ARGUMENT

### I. There Is No Constitutional Requirement Of A Specific Jury Finding Of Individual Culpability Before A Death Sentence May Be Imposed In Any Individual Case Under Enmund v. Florida, 458 U.S. 782 (1982).

In the instant brief, the States of Georgia, Florida, Indiana and Wyoming specifically address the question of whether or not the Fifth Circuit Court of Appeals improperly required a finding by the jury that Respondent "either killed, attempted to kill, or intended a killing or

the use of lethal force." *Bullock v. Lucas*, 743 F.2d at 247. In the instant case, the Fifth Circuit Court of Appeals followed its reasoning in *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir.), *rhng. denied*, 732 F.2d 494 (5th Cir. 1984). The court relied on this Court's opinion in *Enmund v. Florida*, 458 U.S. 782 (1982), but extended that holding to conclude that a specific jury verdict was necessary. Amici curiae submit that no such specific verdict is necessary under an Eighth Amendment analysis as was conducted in *Enmund v. Florida* and under the circumstances of the instant case.

In *Enmund v. Florida, supra*, this Court was faced with the question of "whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, 102 S.Ct. at 3376-7. The Court noted that the question was "the validity of capital punishment for Enmund's own conduct." *Id.* Thus, the Court focused on Enmund's personal culpability and not the other persons involved in the crimes. The Court thus concluded that the record before it did not support a finding that Enmund killed or attempted to kill and that the Florida Supreme Court had not made any such findings. The Court concluded that under the Eighth Amendment, Enmund's culpability was different from that of the robbers who killed and that Enmund could not be sentenced to death under those circumstances.

The Eleventh Circuit Court of Appeals sitting *en banc* has recently taken the opportunity to express its opinion as to the meaning of the decision in *Enmund, supra*. As noted by that court, "The question of whether a defend-

ant's culpability satisfies the eighth amendment is sufficiently distinct from the question of the defendant's guilt that a specific jury finding is not constitutionally required." *Ross v. Kemp*, 756 F.2d 1483, 1488 (11th Cir. 1985) (*en banc*). As noted by that court, the requirement that a jury find every element of the crime beyond a reasonable doubt before a defendant can be found guilty is a focus on procedural due process concerns. *Id.; see United States v. U. S. Gypsum Co.*, 438 U.S. 422 (1978). In contrast, the proportionality review contemplated by *Enmund* "is aimed at insuring that imposition of the death penalty is not excessive in light of the defendant's culpability." *Ross v. Kemp, supra, citing Enmund, supra*, 102 S.Ct. at 3377.

The inquiry mandated by this Court in *Enmund v. Florida, supra*, is simply a proportionality review and does not establish an additional element that the jury must specifically find beyond a reasonable doubt at either the guilt phase of a trial or the sentencing phase of a trial before a death penalty can be imposed. A proportionality review has long been in the province of a reviewing court and is not a function for a jury to undertake. A proportionality review is a review conducted based on the record before either the appellate court or a court on collateral review without a focus on the specific findings made by the jury.

This Court has conducted proportionality reviews in criminal cases on several occasions by examining the record presented to the Court. In *Solem v. Helm*, — U.S. —, 103 S.Ct. 3001 (1983), this Court examined a question of proportionality in relation to a criminal sentence to a recidivist. In making its analysis, the Court referred back

to the decision in *Enmund v. Florida, supra* and specifically characterized it as an application of "the principle of proportionality to hold capital punishment excessive in certain circumstances." *Solem v. Helm, supra,* 103 S. Ct. at 3008. This Court has also examined death sentences in an Eighth Amendment context on a proportionality basis in such cases as *Coker v. Georgia,* 433 U.S. 584 (1977). Similarly, the focus in the instant case is on the proportionality of the death sentence based on the evidence presented at trial in light of the culpability of the individual defendant. Such an analysis does not require a specific jury finding of culpability as was required by the Fifth Circuit Court of Appeals. The question is not whether the jury imputed intent, but whether the evidence was sufficient to conclude that the death sentence was not disproportionate based on the culpability of the individual defendant.

As found by the Eleventh Circuit Court of Appeals, amici curiae submit that *Enmund* merely requires a level of individual participation justifying the imposition of the death penalty in any given case. Thus, the holding by the Fifth Circuit Court of Appeals impermissibly extends the holding of this Court in *Enmund v. Florida, supra* by converting a proportionality review into a requirement that a jury return a specific verdict on a particular element before a death penalty can be imposed. Amici curiae submit that this is an impermissible extension of the Eighth Amendment under the facts of the instant case.

## CONCLUSION

Amici curiae respectfully submit that the decision of the Fifth Circuit Court of Appeals should be reversed on the facts and on the law.

Respectfully submitted,

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No. 84-1236

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

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v.

CRAWFORD BULLOCK, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL LAWYERS AS AMICUS CURIAE

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October Term, 1985

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Respondent.

ON WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

# MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) respectfully moves the Court, pursuant to Rule 36.3, for leave to file the attached Brief as amicus curiae in support of the Respondent.

1. Respondent has consented to this filing; but counsel for Petitioner has stated he would neither consent to nor oppose it, necessitating this Motion.

2. The NACDL is a nationwide nonprofit association of some 5,000 lawyers whose practice includes criminal defense. Its principal purpose is "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself."

Since Gregg v. Georgia, 428 U.S. 153 (1976), the NACDL has actively encouraged its members to undertake the difficult work of representing defendants in capital cases. Through its publications and its adjunct, the National Criminal Defense College, the NACDL has also endeavored to train defense lawyers for this task.

NACDL members currently represent capital defendants in virtually every state which has an active death penalty, including each of the handful of states which still permit imposition of the death penalty for felony murder. The NACDL and its members also have a longstanding concern with the felony murder rule itself, and its anamolous separation of punishment from individual culpability. Both these concerns converge in the issue we believe is presented in this case.

3. The NACDL wishes to file this brief to suggest to that this case presents an appropriate opportunity to resolve an Eighth Amendment issue of historic importance: the constitutionality of the death penalty for felony murder.

We believe the Court of Appeals decision in this case could be affirmed, and Respondent could prevail, even under the narrow, ad hoc Eighth Amendment jurisprudence Petitioner has suggested this Court should adopt in this area. However, we believe that case-by-case approach would continue the uncertainty and inconsistency on this issue now prevalent in the lower courts.

We seek leave to be heard here, to ask this Court to settle this issue in a manner which will make application of the constitution in this vital area turn on the bright line of principle, and not the subtle and elusive shadings of fact presented by individual cases. The principle we believe is pointed to by reason, history, and this Court's prior decisions, is this: the death penalty is

a constitutionally excessive punishment for a killing which occurs in the course of a felony, "with or without any design to effect death ...."

DATED this 9th day of September, 1985.

Respectfully submitted,

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## QUESTION PRESENTED

Does the Eighth Amendment permit the death penalty to be imposed for felony murder, without a finding that the defendant possessed a purpose to cause death?

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No. 84-1236

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

Petitioners,

v.

CRAWFORD BULLOCK, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## INTEREST OF AMICUS

The interest of amicus curiae is set out in the Motion accompanying this Brief.

## SUMMARY OF ARGUMENT

We believe that Crawford Bullock's death sentence is excessive in relation to his individual culpability, by any test. However, we believe that the resolution of this case should turn, not on the ad hoc evaluation of the proportionality of this death sentence Petitioner suggests, but on this principle:

> It violates the Eighth Amendment to impose a penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.

Lockett v. Ohio, 438 U.S. 586, 624 (1978) (concurring opinion of Justice White).

This conclusion is pointed to by all of the "objective factors" that informed this Court's judgment in Coker v. Georgia, 433 U.S. 584 (1977) and Enmund v. Florida, 458 U.S. 782 (1982). Only such a standard can "define the crimes for which death may

be the sentence," Godfrey v. Georgia, 446 U.S. 420, 428 (1980), in a manner which provides a "meaningful basis for distinguishing the few cases in which [the death penalty may be] ... imposed from the many cases in which it [may] ... not." Furman v. Georgia, 408 U.S. 236, 313 (1972) (concurring opinion of Justice White).

## ARGUMENT

### I. THE "OBJECTIVE FACTORS" THIS COURT RELIED ON IN ENMUND V. FLORIDA SHOW THE DEATH PENALTY IS UNCONSTITUTIONAL FOR ANY UNINTENDED KILLING.

Writing for a unanimous Court in Morissette v. United States, 342 U.S. 246 (1952), Justice Jackson said this:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil....

> "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Pound, Introduction to Sayre, Cases on Criminal Law (1927).

342 U.S. at 250 and n.4.[1]

We believe the logic of Enmund v. Florida, supra, would apply a corollary principle to the Eighth Amendment problem presented by the imposition of a death sentence for felony murder. "'[C]ausing harm intentionally must be punished more severely than causing the same harm unintentionally.' M. Hart, Punishment and

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[1] If one had to choose the most basic principle of the criminal law in general *** it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.****
Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y.L. FORUM 565, 586 (1966); accord LaFave and Scott, Criminal Law 554 (1978).

Responsibility 162 (1968)." Id. at 458 U.S. 798. Because no crime can be punished more severely than by death, permitting a death sentence to be imposed for an unintentional felony murder "erodes the relation between criminal liability and moral culpability." People v. Washington, 402 P.2d 130, 134 (Cal. 1965).

Examining the purposes for which it has held a death sentence can constitutionally be imposed, the Court in Enmund noted "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,' Fischer v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)," 458 U.S. at 799, and went on to say this:

> As for retribution as a justification for executing Enmund, we think that this very much depends on the degree of Enmund's culpability--what Enmund's intentions, expectations,

and actions were. American criminal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to "the degree of [his] criminal culpability," Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing. In Robinson v. California, 370 U.S. 660, 667 (1962), a statute making narcotics addiction a crime, even though such addiction "is apparently an illness which may be contracted innocently or involuntarily," was struck down under the Eighth Amendment. Similarly, in Weems v. United States, the Court invalidated a statute making it a crime for a public official to make a false entry in a public record but not requiring the offender to "injur[e] any one by his act or inten[d] to injure any one." 217 U.S., at 363. The Court employed a similar approach in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."

> For purposes of imposing the death penalty Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

458 U.S. at 800-801.

All this points to the conclusion that punishing unintended killings by death violates the Eighth Amendment. So did much of the Enmund majority's examination of "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made." 458 U.S. at 788. Surveying the complex provisions of the law of various states on this issue, the Court found only a minority of states which continued to allow the death penalty to be imposed solely for felony murder. 458 U.S. at 792. In its examination of actual capital verdicts, it noted that, even in Florida,

which has long had America's largest death row,[2] only a small fraction of death sentences --eight--had been imposed where the state "courts made no finding with respect to intent...." 458 U.S. at 795.

Although the Court's opinion in Enmund did not reach this ultimate question, the same objective factors by which it was informed thus suggested that the touchstone of the Eighth Amendment on this problem is intent to kill. Nothing has happened to change that since Enmund was decided. All of the states which the Enmund decision noted require proof of a culpable mental state relative to the death of the victim before a death sentence can be considered, see 458 U.S.

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[2] When Enmund was decided, Florida held 181 condemned prisoners. NAACP Legal Defense Fund, DEATH ROW U.S.A. 6 (June 20, 1982). It currently holds 227. NAACP Legal Defense Fund, DEATH ROW U.S.A. 7 (August, 1985).

at 790, still do. Four additional states continue to "exclude felony murder as an aggravating circumstance that will support a death sentence." 458 U.S. at 752.[3] Two others make a contemporaneous felony an aggravating circumstance, only when the killing is "intentional."[4]

Four of the remaining states which, at the time of Enmund, would have "permit[ted] a defendant who had somehow participated where a murder occurred to be sentenced to die," 458 U.S. at 792, have restricted the scope of their statutes in this regard. California has squarely held

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[3] See id. at n.13; see also Neb. Rev. Stat. §29-2523(1), and State v. Rust, 250 N.W.2d 867, 874 (Neb. 1977).

[4] See Colo.Rev.Stat. §16-11-103(6)(g); Ind. Code §35-50-2-9(b)(1). Colorado also makes it an absolute defense to any death penalty that the defendant "could not reasonably have foreseen that his conduct ... would cause, or would create a grave risk of causing, death to another person." Colo. Rev. Stat. §16-11-103(5)(e).

the statute prohibits imposition of a felony murder death sentence where a killing is not intentional. Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983). Arizona, Mississippi, and North Carolina have instituted procedures which require findings of intent or direct participation in the killing, as a prerequisite to consideration of a sentence of death.[5] Moreover, the trend the Court noted with regard to statutes recently enacted, 458 U.S. at 792, has continued. Oregon--the only state to have enacted a new death

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5 See State v. McDaniel, 665 P.2d 70 (Ariz. 1983); State v. Stokes, 304 S.E.2d 184 (N.C. 1983); Miss. Code Ann. §99-19-101(7) (1983). Georgia has similarly indicated its trial courts should require specific verdicts distinguishing between malice and felony murder, Allen v. State, 321 S.E.2d 710 (Ga. 1984), but has not yet enforced that dictate. Stephens v. Kemp, 327 S.E.2d 185 (Ga. 1985).

penalty law since Enmund--explicitly prohibits imposition of a death sentence absent a finding of homicidal intent.[6]

By our reckoning, this leaves nine states--Connecticut, Florida, Georgia, Maryland, Montana, Nevada, South Carolina, Tennessee, and Wyoming--in which the possibility of imposition of a death sentence for an unintended felony murder remains unchecked. Connecticut has imposed no death sentences. In Wyoming and Montana, all current death sentences have been the subject of reported decisions, which show each state has imposed only one death sentence exclusively for felony murder.[7] Although

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6 See 1984 Oregon Ballot Measure No. 7, Section 3(2)(a), and Ore. Rev. Stat. §163.095(2)(b) (1984).

7 See Fitzpatrick v. State, 638 P.2d 1002 (Mont. 1983); Engberg v. State, 686 P.2d 541 (Wyo. 1984).

they may not be comprehensive of all death sentences currently in effect, the reported decisions of which we are aware identify only three such sentences in Nevada,[8] one each in Maryland and Tennessee,[9] and none in South Carolina.[10] If these reported decisions are representative, that leaves only two states--Florida and Georgia--which may hold a significant number of persons under

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8 See Deutscher v. State, 601 P.2d 407 (Nev. 1979); Petrocelli v. State, 692 P.2d 503 (Nev. 1985); and Nevius v. State, 699 P.2d 1053 (Nev. 1985).

9 See Stebbing v. State, 473 A.2d 903 (Md. App. 1984); State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984).

10 In State v. Yates, 310 S.E.2d 805, 807 (S.C. 1982), the defendant was found to have intended to kill, in a count separate from the murder count. Joseph Carl Shaw, who was executed earlier this year, pled guilty to a murder count which did not specify intent to kill--but the facts of the case clearly showed it. See Shaw v. Martin, 733 F.2d 304, 306 (4th Cir. 1984).

death sentences imposed solely for felony murder. The Florida experience recounted in Enmund, 458 U.S. at 795, suggests that, even in these states, the number of such sentences is not large. So do the reported decisions regarding the persons these two states have executed, the vast majority of whom have specifically been found at trial to have intentionally caused death.[11]

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[11] For Florida, see Dobbert v. Florida, 432 U.S. 282, 285 (1977); Washington v. Strickland, 578 F.2d 582, 586 (5th Cir. 1978); Witt v. Wainwright, 714 F.2d 1069, 1071 (11th Cir. 1983); Antone v. Strickland, 706 F.2d 1534, 1536 (11th Cir. 1983); Francois v. State, 407 So.2d 85, 89 (Fla. 1982); Palmes v. State, 397 So.2d 648, 652 (Fla. 1981); Goode v. State, 365 F.2d 381, 384 (Fla. 1979); Henry v. State, 328 So.2d 430, 438 (Fla. 1976); Solomon v. Kemp, 735 F.2d 395, 399 (11th Cir. 1984). For Georgia, see Green v. Zant, 738 F.2d 1529, 1534 (11th Cir. 1984); Stephens v. Zant, 631 F.2d 397, 402 (5th Cir. 1980); Smith v. State, 222 S.E.2d 308, 311 (Ga. 1976).

We believe that these facts show the centuries-long process of narrowing the felony murder rule,[12] and the longstanding reluctance to impose a death sentence solely on its basis,[13] have reached the

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12 The history of the felony murder rule--from its apparent inception in a mistranslation of Lord Dacre's Case, 72 Eng.Rep. 458 (K.B. 1535), through the extension by Lord Coke that Sir James Stephen called "astonishing" and "monstrous," see 3 Stephen, History of the Criminal Law of England, 57, 65 (1883), to its abolition in England and its increasing rejection in the United States--has often been told, and need not be recounted here. See, e.g., People v. Aaron, 299 N.W.2d 307 (Mich. 1980); Note, Felony Murder as a First Degree Offense: An Anachronism Retained, 66 Yale L.J. 427, 430-433 (1957); Brief for Petitioner, Enmund v. Florida, No. 81-5321 at 16-32.

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> At early common law, the felony murder rule went unchallenged because at that time all felonies were punishable by death. It was, therefore, "of no particular moment whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony."

People v. Aaron, supra, 299 N.W.2d at 310-311, quoting Commonwealth v. Redline,

point where "capital punishment within the confines of [such] ... statutes ... has for all practical purposes run its course." Furman v. Georgia, supra, 408 U.S. at 313 (concurring opinion of Justice White). Although "current judgment ... is not wholly unanimous," Coker v. Georgia, supra, 433 U.S. at 596, it weighs heavily on the side of rejecting capital punishment for felony murder.

This does not gainsay that the felony murder rule itself--like the states' power to punish rape--is "beyond constitutional challenge." Lockett v. Ohio, supra, 438 U.S. at 602. But we submit that, as a justification for exacting death, it has become so "occasional and erratic," that it "is not only grossly out of proportion

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137 A.2d 472, 476 (Pa. 1958) (footnotes omitted). See also Holmes, The Common Law 58 (1881); ALI Model Penal Code §210.2, Comment, at 36 (1980).

to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment." Id. at 625 (concurring opinion of Justice White).

II. ONLY A RULE LIMITING THE KIND OF CRIMES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED CAN PROVIDE A MEANINGFUL BASIS TO DISTINGUISH BETWEEN THOSE DEATH SENTENCES THE EIGHTH AMENDMENT PERMITS, AND THOSE IT DOES NOT.

We also believe a holding that the death penalty cannot be imposed solely for felony murder is most consistent with this Court's "reading of the Eighth Amendment as restricting legislatures' authority to choose which crimes to punish by death." Solem v. Helm, 103 S.Ct. 3001, 3021 (1983) (dissenting opinion of the Chief Justice) (emphasis added). We recognize that the majority in Solem applied a somewhat different analysis to the issue there,

looking to the facts of the individual case to compare "the gravity of the offense and the harshness of the penalty." Id. at 103 S.Ct. 3010. But Solem presented a difficult "problem ... of line-drawing," 103 S.Ct. at 3012; the issue here involves the "qualitative difference between death" and any alternative punishment. Zant v. Stephens, 462 U.S. 862, 884 (1983). It is not inconsistent with the logic of Solem to hold that a different kind of punishment can only be imposed for a different kind of crime.

Nor does this reasoning conflict with the Court's pronouncements that a sentencing jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment." Ramos v. California, 463 U.S. 992, 1008

(1983). Since Furman it has been settled that this kind of "individualized determination" is permissible only after application of an objective criterion which "genuinely narrow[s] the class of persons eligible for the death penalty and ... reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, supra, 462 U.S. at 877. A conviction of felony murder cannot do that.

> Permitting imposition of the death penalty solely on proof of felony murder ... necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded ... the [Justices] ... in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), in holding Georgia's death penalty statute unconstitutional. Whether the death results in the course of a felony (thus giving rise to felony murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendant.

Lockett v. Ohio, 438 U.S. at 620 (concurring opinion of Justice Marshall).

One need only examine the facts of some of this Court's recent cases in this area, to confirm that it is the defendant's intentions--and not his or her proximity to or involvement in the "fortuitous events" that cause death--that distinguishes "moral culpability". Where there is no "finding that the defendant engaged in conduct with the conscious purpose of producing death," id., 438 U.S. at 628 (concurring opinion of Justice White), we can perceive no clear difference between a person who is physically distant from the scene of a killing, see Enmund v. Florida, supra, or one who is immediately outside the building where the crime occurs, see Lockett v. Ohio, supra, or just beyond

view of it, see Bell v. Ohio, 438 U.S. 637 (1978), and Smith v. Oklahoma, 104 S.Ct. 324 (1984). Nor, with life at stake, can we find a principled distinction in the fact that a defendant may have been armed, Woodson v. North Carolina, 428 U.S. 240 (1976)--or even that he actually, though unintentionally, caused death himself, see Furman v. Georgia, supra, and Franklin v. Francis, 105 S.Ct. 1965 (1985).

In Bullock's own case, we cannot imagine it makes a constitutional difference that he was at the scene, or that he was physically in contact with the victim, if he did not contemplate that life would be taken. Even if he was in some sense an "active participant in the assault and homicide," Bullock v. State, 391 So.2d 601, 614 (Miss. 1980)--a conclusion we do not agree the record

fairly supports under 28 U.S.C. §2254(d)(8)--that does not make death proportionate "to his personal responsibility and moral guilt," Enmund v. Florida, supra, 458 U.S. at 801, if his intent was not to kill or aid a killing.[14]

Moreover, we see no way an appellate court could reconstruct these facts, if they were critical, with a confidence adequate to the "need for reliability in the determination that death is the appropriate punishment in a specific

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> "Every assault involves bodily harm but any doctrine which would hold every assailant as a murderer where death follows his act, would be barbarous and unreasonable." Wellar v. People, 30 Mich. 1620 (1874).
>
> While it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring the principles underlying our system of criminal law.

People v. Aaron, supra, 299 N.E.2d at 318.

case," Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion).[15] What can be decisively determined, though, is that at this criminal trial--"the time and place set for [the defendant] to be tried by a jury of his peers and found either guilty or not guilty," where "[t]o the greatest extent possible all issues which bear on this charge should be determined," Wainwright v. Sykes, 433 U.S. 72, 90 (1977)--there was no "finding that the defendant engaged in conduct with a conscious purpose of causing death...."

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[15] In this regard we find it remarkable, though not surprising, that, by our count, in only five cases decided elsewhere than the Fifth Circuit have death sentences been reversed under the authority of Enmund. See State v. McDaniel, supra; Brumbley v. State, 453 So.2d 381 (Fla. 1984); People v. Tiller, 447 N.E.2d 174 (Ill. 1982), cert. denied 461 U.S. 944 (1983); State v. Stokes, supra; State v. Oliver, 307 S.E.2d 304 (N.C. 1983).

Lockett v. Ohio, supra, 438 U.S. at 629 (concurring opinion of Justice White). That can and should dispose of this case.

We recognize that there may remain some uncertainties in "defin[ing] a convincing bright line rule such as was used in regard to rape," in the marginal cases involving unusual definitions of mens rea. Id. at 438 U.S. 614 (concurring opinion of Justice Blackmun). But those difficulties should be minor compared to those which would be presented by the ad hoc approach suggested by Petitioner here.

Most states already "make knowing, intentional, purposeful, or premeditated killing an element of capital murder."[16] Several others require proof a killing was "intentional" before a felony circumstance

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16 Enmund v. Florida, supra, 458 U.S. at 790. See id. at 789 n.6 and 7.

can make murder capital.[17] Even those states which do not require this in all cases, have primary definitions of murder which plainly encompass a "conscious purpose of causing death."[18] Sentences

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17 See the Indiana and Colorado statutes cited at n.3, above, and Carlos v. Superior Court, supra.

18 See Ariz. Rev. Stat. §13-1105 (1982-3) ("inten[tionally] or knowing[ly] ... causes ... death ... with premeditation"); Ark. Stats. Ann. §41-1501(b) ("premeditated and deliberated purpose of causing ... death"); Conn. Gen. Stat. Ann. §53-85-4(a)(b) (West Supp. 1981) ("intent to cause ... death"); Del. Code Ann. Tit. 11 §636 (1) ("intentionally ... causes death"); Fla. Stat. Ann. §782.04 ("premeditated design to effect ... death"); Ga. Code Ann. §26-1101 (Supp. 1983) ("malice aforethought"); Ken. Pen. Code §507.020(a) ("intent to cause ... death"); Md. Crim. Law Code Ann. §407 ("willful, deliberate and premeditated killing"); Miss. Code Ann. §97-3-19(1)(a) (1982) ("deliberate design to effect ... death"); Mont. Rev. Code Ann. §44-5-102(1)(a) (1981) ("purposely or knowingly [causes death]"); Rev. Stats. of Neb. §28.303(1) (1979) ("purposely and with deliberate and premeditated malice [kills]"); Nev. Rev. Stat. §200.080 ("malice aforethought"); Ok. Stat. Ann. §701.7 (1982) ("malice aforethought");

imposed pursuant to such definitions will be unaffected by the rule we propose. So may be less absolute definitions of mens rea, so long as they reflect an awareness of a likely loss of human life, and therefore relate to the moral and societal purposes the death penalty has been held to serve.[19] But the decision of that narrow, remaining question can await the

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S.C. Code §16-3-10 (Supp. 1980) ("malice aforethought"); Tenn. Code Ann. §39-2-202(a) (1982) ("willful, deliberate, malicious and premeditated killing"); Wyo. Stat. Ann. §6-4-101 (1977) ("purposefully and with premeditated malice").

[19] This kind of mens rea may be what the Court in Enmund was referring to, in its references to an "anticipa[tion] that lethal force would or might be used...." 458 U.S. at 788.

rare, remaining case in which such a definition of culpability may be used as a basis for a sentence of death.

Crawford Bullock's case does not present that question. His jury was told it made no difference if he acted "with or without any design to effect ... death." The death sentence imposed by that jury should be reversed.

Respectfully submitted,

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September 9, 1985